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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 647

BATES MANUFACTURING COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 24, 1937.

CERTIORARI GRANTED JANUARY 31, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3580. Law Docket

BATES MANUFACTURING COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed March 21, 1929

Now comes the petitioner in the above-entitled matter and says:

1. The petitioner is and was at all times relevant to the matters herein complained of a corporation duly organized according to law and having an usual place of business on Congress Street, Boston, in the District of Massachusetts.

2. This action is brought against the United States of America in the United States District Court for the District [fol. 2] of Massachusetts, said court having jurisdiction of the matters herein complained of by the petitioner.

3. The said action is one to recover back federal war profits taxes, excess profits taxes and income taxes for the taxable periods ending December 31, 1917, December 31, 1918, December 31, 1919, December 31, 1920 and December 31, 1921, respectively; which the petitioner alleges were erroneously and illegally assessed against and paid by the petitioner, and is an action arising out of the laws of the United States providing for internal revenue; the Collectors of Internal Revenue who collected the said taxes are not now in office.

4. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of have been denied or rejected by the Commissioner of Internal Revenue.

5. The dates of filing of all returns; the dates and amounts of all payments; the dates of the claims for refund, and the dates of the rejections or denials of the said claims

for refund are hereto detailed and enumerated in a schedule hereto annexed and marked "A".

6. The petitioner claims a refund in the sum of $47,468.15 for the taxable period ending December 31, 1917, paid as part of the original and subsequent profits and income taxes for that year, upon the following grounds:

That the Commissioner by his agents in computing the invested capital upon which computation the said taxes hereinbefore referred to were assessed against and paid by the petitioner settled the value for the lands, buildings, machinery and like tangible property in the sum of $4,278,-269.56 less reserve of $1,446,514.73, all of which is fully itemized in a schedule hereto annexed and marked "B"; that the petitioner alleges that the correct value for the said lands, buildings, machinery, and like tangible property is the sum of $5,562,068.32 less reserve of $1,605,-126.99, which further appears fully itemized in said schedule hereto annexed marked "B".

That the Commissioner by his agents incorrectly and erroneously arrived at the said value so computed by him or his agents for the following reasons:

(a) The Commissioner improperly and illegally refused [fol. 3] to allow restorations to invested capital for the period from the year 1856 to and including the year 1916, less a proper depreciation thereon;

(b) That the current depreciation when correctly determined should have been made on the sum of $3,956,941.33—net, instead of the improper rate of depreciation which the Commissioner by his agents allowed on the sum of $2,831,-754.83—net;

(c) That the Commissioner by his agents has refused to accept the valuation of the property hereinbefore referred to, to wit, buildings, machinery and like tangible property as of the date of March 1, 1913, in the determination of the amount of depreciation solely, which the petitioner alleges it was entitled to, and which refusal by the said Commissioner by his agents the petitioner alleges was prejudicial error.

(d) That the Commissioner by his agents refused to allow the petitioner an accentuated or accelerated rate of depreciation for the said taxable period which rate the petitioner alleges it was entitled to for the reason that during the said

taxable period the petitioner suffered from innumerable abnormal conditions of exhaustion, wear and tear.

7. The petitioner claims a refund of $88,630.00 for the taxable period ending December 31, 1918, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in the preceding paragraph and subdivisions thereof.

8. The petitioner claims a refund of $59,838.31 for the taxable period ending December 31, 1919, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in paragraph 6 and subdivisions thereof.

9. The petitioner claims a refund of $1,000 for the taxable period ending December 31, 1920, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in paragraph 6 and subdivisions thereof.

10. The petitioner claims a refund of $116,413.25 for the taxable period ending December 31, 1921, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in paragraph 6 and subdivisions thereof.

[fol. 4] 11. That in the whole premises referred to herein the Commissioner by his agents wholly acted in an arbitrary and improper manner and grossly erred in the particulars specifically assigned herein and generally in the interpretation of the laws pertaining hereto and demanded of the petitioner an impossible measure of proof of its contentions which was never contemplated and which cannot be fairly inferred to result from a reasonable and proper construction of the Internal Revenue Acts as enacted by the Congress of the United States.

Wherefore the petitioner prays judgment herewith for the said sums of $47,468.15, $88,630, $59,838.31, $1,000 and $116,413.25, with interest on the said sums from the dates upon which the said sums were paid; and its reasonable costs of this suit.

By its Attorneys, Goulston & Storrs, David H. Greenberg.

Duly sworn to by H. de F. Lockwood. Jurat omitted in printing.

Exhibit "A" to Petition

Dates of Filing:

Calendar Year	1917	filed on or before		June 1, 1918
" "	1918	" " "	"	June 15, 1919
" "	1919	" " "	"	Mar. 15, 1920
" "	1920	" " "	"	Mar. 15, 1921
" "	1921	" " "	"	Mar. 15, 1922

[fol. 5]

Payments were as follows:	Date of Payment	Amount of Tax
1917 Paid in 1918—Acct. No. 1752677	$106,091.27	
Additional—August, 1919, P. 27—L. 9	16,415.37	
Amended return September, 1921, P. 75—L. 7 Rev. Agts. Rpt.	1,914.25	
	9,756.68	
Total	$134,177.57	
Refunded—1927—August	4,540.38	
Net Tax Paid		$129,637.19
1918 In installments—final Return		
1919—Account No. 401277 Total	$664,227.21	
Additional—Sept. 1921 P. 75—L. 7 Rev. Agts. Rpt.	76,852.33	
Total	$741,079.54	
Refunded—August 1927	18,732.42	
Net Tax Paid		$722,347.12
1919 Paid original return—quarterly installments Account No. 408789 June 1920	327,842.59	
Additional—Sept. 1921—P. 75—L. 9 Rev. Agts. Rpt.	36,326.07	
Total	$364,168.66	
Less: Refund—August 1927	13,510.75	
Net Tax Paid		350,657.91
1920 Tax original return—installments 1921, Account No. 406253	$50,229.07	
Refund—August 1927	324.63	
Net Tax Paid		49,904.44

[fol. 6]

	Date of Payment	Amount of Tax
Payments—1921 Tax original return		
Paid 1922—installments		
Account No. 411250	$489,541.31	
Refund—August 1927	4,198.47	
Net Tax Paid		$485,342.84

Refund Claims were filed as follows:

Date of Filing	Year Involved	Amount
3/11/24	1917	$75,000.00
3/11/24	1918	250,000.00
9/15/24	1917	47,468.15
9/15/24	1918	88,680.00
9/15/24	1919	59,838.31
9/15/24	1921	116,413.25
3/31/25	1917	40,000.00
3/31/25	1918	80,000.00
3/31/25	1919	40,000.00
4/12/26	1920	$1.00*
4/12/26	1921	$1.00*

* Or more.

Waivers were filed June 15, 1924 for the years 1917, 1918 and 1919.

Renewal Waivers were filed June 15, 1925 for the years 1917, 1918 and 1919.

Both of the above were filed under authority of Special Acts of Congress.

Previously, original Waiver for 1917 only was filed in 1923.

Dates of rejection of Refund Claims were as follows:

The five years were rejected March 22, 1927, although Overassessment Certificates were not received until August, 1927—Rejection Schedule No. 24,683.

[fol. 7] EXHIBIT "B" TO PETITION

Valuation of Land, Buildings, Machinery and Like Tangible Property

	Revenue Department's Valuation	Corporation's Contention for Valuation
Land	$236,378.68	$377,456.80
Bldgs.	2,089,700.05	2,790,494.61
Mchy Equip. & Looms	1,845,762.12	2,394,116.91
Looms	106,428.71	0
Total	4,278,269.56	5,562,068.32
Less: Reserve	1,446,514.73	1,605,126.99
Net	$2,831,754.83*	$3,956,941.33*

* Amounts in dispute. Above starting point January 1, 1917, as adjusted by subsequent years to affect all five years.

Above on cost basis 1913 increase also in dispute.

Foregoing certified to as correct.

JAINE V. GILLIN, C.P.A.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE—Filed March 28, 1929

David H. Greenberg, being first duly sworn, deposes and says that he is one of counsel for the foregoing petitioner and that on March 25, 1929, he personally served upon the United States District Attorney for the District of Massachusetts, at his office in the United States Courts and Post Office Building, Boston, the within contained notice and copy of petition; and that on said twenty-fifth day of March, 1929, he thereupon mailed a copy of said notice and petition to the Attorney General of the United States at Washington, all in the form and manner as required by law.

David H. Greenberg, One of Counsel for Petitioner.

[fol. 8] Subscribed to and sworn before me this twenty-sixth day of March, 1929. Elizabeth P. Weber, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION

SIRS:

Please take notice that the within petition was duly filed with the Clerk of the District Court of the United States for

the District of Massachusetts on the 22nd day of March, 1929, which Court has jurisdiction of the cases therein set forth and in which district the plaintiff has an usual place of business.

Boston, March 23, 1929.

—— ——, Attorneys for Petitioner, 80 Federal St., Boston, Mass.

To the Honorable the Attorney General of the United States, and to the Honorable the Attorney of the United States for the District of Massachusetts.

In United States District Court

Answer—Filed May 16, 1929

Now comes the defendant in the above-entitled action and denies each and every material allegation, item, count and particular in the petitioner's petition contained.

By its Attorneys, Frederick H. Tarr, United States Attorney, by J. Duke Smith, Special Assistant to the United States Attorney.

Recitals as to Proceedings

This cause was thence continued from term to term to the December Term, A. D. 1931, when, to wit, January 2, 1932, this cause was dismissed without prejudice and without [fol. 9] costs for lack of prosecution under general order of September 19, 1922.

At the September Term, A. D. 1934, to wit, October 16, 1934, a petition for leave to file a bill of review was filed and allowed.

At the March Term, A. D. 1935, to wit, May 28, 1935, said cause was restored and reopened by the final decree entered in case No. 4049, Equity, Bates Manufacturing Company v. United States of America on the twenty-eighth day of May, A. D. 1935.

This cause was thence continued from term to term to the December Term, A. D. 1936, when, to wit, December 29, 1936, a motion was filed by the plaintiff to exempt case from the operation of Rule 34, and allowed by the court.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S MOTION TO DISMISS—Filed May 4, 1937

Now comes the respondent above-named, by Francis J. W. Ford, United States Attorney for the District of Massachusetts, and Arthur L. Murray, Special Assistant to said United States Attorney, its attorneys, and respectively moves the court to dismiss the petition herein filed, and as grounds for said motion says:

1. That this court is without jurisdiction to hear and determine this cause of action instituted against the above-named respondent, in that the cause of action set forth in the petition filed herein is barred by the provisions of Section 3226 of the Revised Statutes of the United States, as amended by Section 1113 (a) of the Revenue Act of 1926.

Wherefore, the respondent prays the judgment of this court and that the petitioner may be barred from maintaining this action against the respondent.

Job No. 3897 Supreme Court Record No. 647

Francis J. W. Ford, United States Attorney, by Arthur L. Murray, Special Assistant to the United States Attorney.

[fol. 10] RECITAL AS TO FURTHER PROCEEDINGS

At the same term, to wit, May 11, 1937, said cause was set down for hearing on the respondent's motion to dismiss for lack of jurisdiction, the Honorable George C. Sweeney, District Judge, sitting.

Said cause was thence taken under advisement and on the eighteenth day of June, A. D. 1937, a memorandum of the court was announced allowing the respondent's motion to dismiss.

On the said eighteenth day of June, A. D. 1937, plaintiff excepted to the allowance of the motion of the United States to dismiss and to the finding and ruling that the court has no jurisdiction.

This cause was thence continued to the present June Term, A. D. 1937, when, to wit, July 1, 1937, a plaintiff's bill of exceptions is filed and assented to, said bill of exceptions being allowed by the court on July 20, 1937.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S MOTION FOR JUDGMENT FORTHWITH—Filed and Allowed July 20, 1937

Now comes the respondent, in the above-entitled action, and moves that judgment be entered for the respondent forthwith.

By its Attorney, Francis J. W. Ford, United States Attorney, by Arthur L. Murray, Special Assistant to the United States Attorney.

7, 20, 37. Geo. C. Sweeney.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, July 20, 1937, it is considered by the court, the Honorable George C. Sweeney, District Judge, sitting, that the said United States of America, defendant, recover of the Bates Manufacturing Company, plaintiff, its costs of suit taxed at —.

IN UNITED STATES DISTRICT COURT

CLAIM OF APPEAL AND ALLOWANCE THEREOF

From the foregoing judgment, the Bates Manufacturing Company, plaintiff, claims an appeal to the United States Circuit Court of Appeals for the First Circuit on July 20, [fol. 11] 1937 and said appeal is allowed on the same day.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—June 18, 1937

SWEENEY, J.:

In this suit, which is for the recovery of federal excess profits and income taxes alleged to have been erroneously assessed and collected by the United States, the Govern-

ment first filed a general denial, and later filed a motion to dismiss, basing that motion upon the question of jurisdiction.

Claims for refund of the taxes paid were seasonably filed with the Commissioner of Internal Revenue, and were rejected on March 22, 1927. On March 21, 1929, the plaintiff filed, in the office of the clerk of this court, the petition now under consideration. A copy of it was not served on the United States Attorney until March 25, 1929. Notice of the filing of the petition was mailed to the Attorney General on the same date. On March 28, 1929, the plaintiff filed with the court an affidavit of the service and mailing of notice as set forth above.

The Government contends that the court is without jurisdiction in this case, because the plaintiff has failed to comply with the terms of the legislation by which the United States consented to be sued in cases of this type.

The motion to dismiss brings up the following questions: (1) Whether an action against the United States for the refund of taxes was "begun within two years after the disallowance" of the claim for refund, within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition was filed prior to the expiration of the two-year period and a copy of the petition was served on the United States Attorney, and notice mailed to the Attorney General, three days after the statutory period had elapsed, and (2) whether possible objection to the maintenance of the suit, on the ground that the petition was not served until three days after the expiration of the period of limitations, was waived by the defendant by the filing of a general denial and the failure to raise the objection until more than eight years after the filing of the petition.

Section 3226 of the Revised Statutes provides that no [fol. 12] suit or proceeding for the refund of taxes may be begun after two years from the date of the disallowance of the claim for refund. That statute is silent as to the mode of procedure to be adopted in beginning or commencing a suit or proceeding. 28 U. S. C. A. Sections 762, 763, however, provide that in such suits the plaintiff shall file a duly verified petition in the office of the clerk of courts having jurisdiction of the case, and that the plaintiff shall cause a copy of his petition, thus filed, to be served upon the District Attorney of the United States in said district, and

shall mail a copy of same to the Attorney General of the United States, and shall thereupon cause to be filed an affidavit of such service. Section 763 provides further that the District Attorney, upon whom such service is made, shall appear and defend the interests of the United States, and file proper pleadings within sixty days of such service of the petition upon him.

Procedure set forth in consent legislation must be strictly followed in order to secure jurisdiction. Walton v. United States, 73 F. (2d) 15, 17.

While I can find no case directly in point, I believe that I am bound by the reasoning and utterances of the court in this and other circuits where it has been "uniformly held that the suit cannot be regarded as commenced until all the requirements of the statute have been met or at least until a copy of the petition has been served on the United States attorney". Spencer v. United States, 14 F. Supp. 46, 47. See also Miller v. United States, 11 F. Supp. 924, 925; Walton v. United States, 73 F. (2d) 15, 18.

The facts in this case show a closer compliance with the requirements and conditions of the statute than in the cases cited herein, and I feel that the case is so close to the line that the jurisdictional question should be finally decided before a trial on the merits.

I therefore find and rule that this court has no jurisdiction to entertain this suit because of the plaintiff's failure to comply with 28 U. S. C. A. Sections 762, 763.

After the Government had filed its general denial, which was in May of 1929, this case remained inactive until January 22, 1931, when counsel for the plaintiff withdrew their appearance. In February of 1931 new counsel appeared, [fol. 13] and again on June 25, 1931, further counsel appeared for the plaintiff. The case again remained inactive until April 13, 1937, when present counsel entered their appearance for the plaintiff. On May 4, 1937, the Government's motion to dismiss was filed. Apparently no action was taken by either side during the eight years to bring this case to trial. The lapse of time has in no wise harmed the defendant, even if it could be held that any Government official had the right to waive the jurisdictional question. I am of the opinion that Pacific Mills v. Nichols, 72 F. (2d) 103, controls the effect of the Government's having filed its general denial, and later raising the question

of jurisdiction. Since the jurisdictional question rests wholly upon the terms and conditions which the Government has set forth as a condition upon which suit may be brought, such terms and conditions cannot be enlarged by any Government official or employee either by affirmative or negative acts. See also Finn v. United States, 123 U. S. 227.

The Government's motion to dismiss is therefore allowed.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS—Filed July 1, 1937; Allowed July 20, 1937

This is an action against the United States under United States Code, Title 28, Section 41(20), for the recovery of income and excess profits taxes for the calendar years 1917 to 1921, inclusive, alleged to have been erroneously and illegally collected from the plaintiff. The petition was filed March 21, 1929, copies were served on the United States Attorney and mailed to the Attorney General on March 25, 1929, and an affidavit of service was filed on March 28, 1929. It was alleged in the petition that claims for refund of the taxes in question had been rejected by the Commissioner of Internal Revenue on March 22, 1927. The respondent entered its appearance by the United States Attorney, and filed its answer of general denial on May 16, 1929.

The pleadings, affidavit of service and docket entries are referred to and made a part of this bill of exceptions.

On May 4, 1937, prior to any hearing on the merits of the case, the respondent filed a motion to dismiss plaintiff's petition on the ground that the court was without jurisdic-
[fol. 14] tion to hear and determine the cause of action in that the cause of action set forth in the petition was barred by the provisions of Section 3226 of the Revised Statutes of the United States as amended by Section 1113 (a) of the Revenue Act of 1926.

On May 11, 1937, the case was heard before Honorable George C. Sweeney, District Judge, upon the respondent's motion to dismiss.

On June 18, 1937, the court (Sweeney, J.) rendered its decision, holding that it had no jurisdiction to entertain the

suit, and allowed the respondent's motion to dismiss. The memorandum opinion of the Court is referred to and made a part of this bill of exceptions. The plaintiff duly excepted in open court to said ruling and to the allowance of said motion.

The above constitutes all the evidence and facts relevant to any exceptions taken by the plaintiff.

The plaintiff tenders and presents the foregoing as its bill of exceptions and prays that the same may be settled and allowed.

Bates Manufacturing Company, by Charles B. Rugg, its Attorney.

Assented to: Francis J. W. Ford, United States Attorney, by Arthur L. Murray, Special Assistant to the United States Attorney.

July 20, 1937. The foregoing bill of exceptions is allowed.
George C. Sweeney, District Judge.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENTS OF ERRORS—Filed July 20, 1937

Now comes Bates Manufacturing Company, plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this court entered on the eighteenth day of June, 1937:

1. The court erred in holding that a suit against the [fol. 15] United States under United States Code, Title 28, Section 41 (20), cannot be regarded as commenced until a copy of the petition has been served on the United States Attorney.

2. The court erred in holding that the plaintiff had failed to comply with the provisions of United States Code, Title 28, Sections 762 and 763.

3. The court erred in holding that it had no jurisdiction to entertain this suit.

4. The court erred in holding that the respondent had not waived its objection to the maintenance of the action by filing a general denial and failing to raise the objection until more than eight years after the filing of the petition.

5. The court erred in allowing the respondent's motion to dismiss.

Bates Manufacturing Company, by Charles B. Rugg, its Attorney.

RECITAL AS TO DEPOSIT IN LIEU OF BOND

On the said twentieth day of July, A. D. 1937, the sum of two hundred fifty dollars ($250) was deposited by the plaintiff in lieu of bond on appeal.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

Mar. 21, 1929. Petition filed.
28, Affidavit of service of petition filed.
May 16, Answer filed.
Jan. 22, 1931. Appearance of Goulston & Storrs and David H. Greenberg for plaintiff filed.
Feb. 9, Appearance of Edward A. Counihan, Jr., for plaintiff filed.
June 25, Appearance of E. H. Maxcy for plaintiff filed.
Jan. 2, 1932. Dismissed without prejudice and without costs for lack of prosecution under General Order of Sept. 19, 1922.

[fol. 16]

Oct. 16, 1934. Petition for leave to file a bill of review filed.
16, Brewster, J. Petition allowed, leave to file bill of review granted.
May 28, 1935. Restored and reopened by Final Decree in Equity No. 4049, entered May 28, 1935.

Dec.	29, 1936.	Plaintiff's motion to exempt case from operation of Rule 34, assented to, filed.
	29,	Brewster, J. Motion allowed, case accordingly exempted from operation of Rule 34.
Apr.	13, 1937.	Appearance of Charles B. Rugg and Ropes, Gray, Boyden & Perkins for plaintiff filed.
May	4,	Respondent's motion to dismiss filed.
	11,	Sweeney, J. Hearing on respondents motion to dismiss for lack of jurisdiction; taken under advisement.
June	18,	Sweeney, J. Memorandum on respondent's motion to dismiss:—Motion to dismiss allowed; plaintiff excepts to allowance of motion to dismiss and to the finding and ruling that the court has no jurisdiction. Memo. filed.
July	1, 1937.	Plaintiff's bill of exceptions filed, assented to.
	20,	Sweeney, J. Plaintiff's bill of exceptions allowed.
	20,	Defendant's motion for judgment filed.
	20,	Sweeney, J. Motion allowed, judgment accordingly for the defendant.
July	20, 1937.	Plaintiff's petition for appeal filed.
"	" "	Plaintiff's assignment of errors filed.
"	" "	$250. deposited by plaintiff in lieu of bond on appeal.
"	" "	Sweeney, J. Plaintiff's appeal allowed.
"	" "	" J. Citation on appeal issued, retble. in U. S. Circuit Court of Appeals August 19, 1937.

Recital as to Citation and Service

A citation on appeal was issued on July 20, 1937, being made returnable in the United States Circuit Court of Appeals on August 19, 1937. Service of said citation was duly acknowledge-.

[fols. 17-18] Clerk's certificate to foregoing transcript omitted in printing.

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, September 18, 1937, is here omitted. A. I. Charron, Clerk.]

[fol. 19] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1937

No. 3280

BATES MANUFACTURING COMPANY, Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA, Defendant, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed December 8, 1937

BINGHAM, J.:

This is an appeal from a judgment of the federal District Court for Massachusetts in favor of the defendant. The plaintiff brought an action to recover income and excess profits taxes alleged to have been erroneously and illegally assessed and collected for the years 1917, 1918, 1919, 1920, and 1921, amounting to $313,249.71. Its petition was filed in the District Court on March 21, 1929. May 16, 1929, the defendant filed an answer denying every material allegation of the petition. January 2, 1932, the petition was dismissed without prejudice for lack of prosecution. May 28, 1935, a bill of review having been filed and allowed, the case [fol. 20] was restored to the docket. May 4, 1937, the defendant filed a motion to dismiss the petition on the ground that the District Court was without jurisdiction to hear and determine the cause, alleging that the petition was barred by the provisions of Section 3226 of the Revised Statutes, as amended by Section 1132 of the Revenue Act of 1926.

June 18, 1937, the court granted the motion to dismiss, and a judgment of dismissal having been entered on July 20, 1937, this appeal was taken.

From the allegations of the petition it appears that the taxes in question were duly paid; that the collectors who collected the taxes were not in office at the time of the filing of the petition; that claims for refund were seasonably filed with the Commissioner and were rejected on March 22, 1927; that on March 21, 1929, the plaintiff filed the petition in question in the office of the clerk of the District Court for Massachusetts; that on the 25th of March, 1929, a copy of the petition was served, by the then attorney for the plaintiff, upon the District Attorney for the District of Massachusetts; that on the same day (March 25) a copy of the petition and notice of its filing were sent by registered letter to the Attorney General of the United States; and that, on March 28, 1929, an affidavit of the service and mailing of notice as therein stated was filed with the court.

The applicable statutes under which this controversy arises are the following: Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116; United States Code, Title 28, sections 41 (20) and 762 and 763. Section 3226 reads as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions [fol. 21] of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or

proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Title 28, Sections 41 (20) and 762 and 763 of the United States Code are as follows:

"Section 41 (Judicial Code, section 24, amended) Original Jurisdiction. The district courts shall have original jurisdiction as follows: * * *

(20) Suits against United States.—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector [fol. 22] of internal revenue at the time such suit or proceeding is commenced. * * *"

"§ 762. Petition in suit against United States.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money

or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

"§ 763. Same; service; appearance by district attorney. —The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. * * *"

The only question in the case here presented is whether the proceeding was begun within two years after the disallowance, on March 22, 1927, of the claims in question, the petition having been filed March 21, 1929, but not served until March 25, 1929.

The plaintiff concedes that if it had failed to file a verified petition within the two-year period no proceeding would have been begun against the United States within the meaning of Section 3226, as amended; but contends that such a proceeding is begun within that section if a verified petition [fol. 23] is filed in the District Court, without its having been served upon the District Attorney for the District within the prescribed time. In other words, that the mandatory provision of Section 762 as to filing is essential to the commencement of the proceeding, but the equally mandatory provisions of Section 763 as to service are not.

It is also conceded that the provisions of the Conformity Act (Sec. 724, Title 28, U. S. C. A.) requiring that the practice, pleadings and mode of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts

of the state within which the district court is held (Sec. 724), and that the laws of the several states, except where the constitution, treaties and statutes of the United States otherwise require or provide, shall be regarded as rules of decision in actions at common law in the court of the United States (Sec. 725), do not apply and govern the situation here presented. And it may well be so conceded for the practice, pleadings, forms and modes of proceeding in the courts of the state do not and could not provide the method of suing the United States or of service of process upon it in proceedings in a federal district court sitting as a court of claims; for suits against the United States can be maintained only by its consent and in the manner and subject to the restrictions that it may see fit to impose. Reid v. United States, 211 U. S. 529, 538; Kawananakoa v. Polyblank, 205 U. S. 349, 353. The bringing of such a suit is the exercise of a privilege and not of a right, and is subject to such restrictions and conditions as Congress may see fit to impose upon its exercise. Munro v. United States, 89 Fed. (2d) 614, 615.

But, notwithstanding these concessions, it is further contended that, inasmuch as the federal statutes do not specifically state when such a proceeding is begun in a district court, we should determine the question as a matter of general law, guided by the decisions of the courts of the states [fol. 24] and of England, and should find and rule that this proceeding was begun on the filing of the petition with the clerk of court.

We think it is a sufficient answer to this contention that this proceeding is against the United States over which the District Court is given special jurisdiction sitting as a court of claims (Reid v. United States, 211 U. S. 529, 538), and not an action or proceeding of a private nature against a corporation or individual over which it is given its ordinary and well understood jurisdiction as a District Court; and that if the statutes conferring such jurisdiction and conditioning the mode and manner of its exercise in terms, or by reasonable implication, impose requirements as to the bringing of such action or proceeding against the United States, those requirements must be complied with, or the District Court is without jurisdiction to entertain the proceeding.

Section 41 (20), above quoted, is the section conferring jurisdiction on the District Court over such a proceeding as

this and authorizes it to be brought against the United States for the recovery of an internal revenue tax, as the claim exceeds $10,000 and the collector by whom the tax was collected was out of office at the time the proceeding was commenced; and Sections 762 and 763 provide by implication, if not in express terms, the mode and manner a suit against the United States under Section 41 (20) shall be begun, namely, that the plaintiff shall file a duly verified petition, setting forth the name and residence of the plaintiff, the nature of his claim and the facts upon which it is based, and "*shall cause* a copy of his petition filed under Section 762 *to be served* upon the District Attorney of the United States in the District wherein the suit is brought." Both of these requirements are mandatory and are conditions precedent to the bringing of the proceeding against the United States and to conferring jurisdiction on the District Court under Section 41 (20); and, as service has not been had within the two years the action was not seasonably begun.

[fol. 25] It is objected that these sections do not state when the petition shall be served. The same is true as to when the petition shall be filed, but the implication from the language employed is that both acts shall be done before the action or proceeding is begun, and we so hold. See Munro v. United States (2d Circuit), 89 Fed. (2d) 614, 616; Creasy v. United States, 4 Fed. Supp. 175, 179; Spencer v. United States (Mass. District Court), 14 Fed. Supp. 46. See also Walton v. United States, 73 Fed. (2d) 15, where we think the court reached the correct result, but by a wrong course of reasoning; and Bachmann, Emmerick & Co., Inc., v. United States (So. Dist. N. Y. June 4, 1935), Prentiss Hall Tax Service, 1935, Par. 1479; see also Par. 1967.

It has been suggested that in the Court of Claims a proceeding against the United States is begun by the filing of a petition (U. S. C. Title 28, Sec. 262) and, as the proceeding is regarded as begun on the filing of a petition in that court, we should hold that a like proceeding in the district courts is begun when the petition is filed. It is not for us to determine why Congress did not make the same requirements in both courts as to when a proceeding is begun against the United States, but it did not. It may be suggested, however, that in the Court of Claims the United States is the only party against whom a suit may may there

be brought and there was no occasion for service of process upon the government, for its representative, the Attorney General, with his assistants, is required to appear in that court and defend all cases there brought (U. S. C. Title 28, Sec. 291) while, in the district courts, the United States is not the only party against whom suits may there be brought and hence Congress required service upon the district attorney as the representative of the goverament, as well as the filing of the petition in court.

Whether the mailing of a copy of the petition by registered letter to the Attorney General is or is not a condition to the bringing of the proceeding before it can be said that [fol. 26] it is begun, it is unnecessary for us to determine, for it appears that no service was had upon the District Attorney within the District prior to the expiration of the two-year period here in question.

The judgment of the District Court is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed December 8, 1937

MORTON, J. (dissenting):

I am unable to agree, and the question is of such general importance that I will state my views. It seems to me that the filing of the petition in the District Court stopped the running of the statute of limitations if followed up by service of process within a reasonable time. "A suit is commenced by the filing of the petition or bill with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of the process." Mount City Co. v. Castleman, 187 Fed. 921, 925. This is the settled rule in England, in the federal courts in this country, and in all the state courts except a few which have peculiar codes.

The present question is whether this general rule, which of course was well understood by Congress, was intended to be changed by the statutes authorizing suits against the United States. Rev. Stat. 1069, which was originally passed in 1863, was incorporated unchanged into the Judicial Code. (28 U. S. C. A. section 262.) It reads: "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition set-

ting forth a statement thereof is filed in court, * * * within six years after the claim first accrues." In the Act conferring jurisdiction on the District Courts over such claims the language is, "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued." (28 U. S. C. A. § 41 (20)).

In the Court of Claims filing the petition has always constituted and still constitutes bringing suit; there is, I un- [fol. 27] derstand, no disagreement on this point. So the government's contention resolves itself into this, that a different rule of limitation applies in the District Courts from that which applies to the same cases when brought under the same statute in the Court of Claims, and that the rule which applies to these cases in the District Courts is different from the rule which applies to all other cases in those courts. Very explicit language should be required to lead to such a result. The statutes relied on as having this effect are found in 28 U. S. C. A. sections 761, 762, and 763. Section 761 provides: "The course of procedure for the district courts and the court of claims in cases under section 41, paragraph 20, (district courts) and section 250 (court of claims) of this title, in so far as applicable and not inconsistent with sections 762 to 765, * * * shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt." This section, it will be observed, explicitly refers to and adopts, with reference to claims against the government, the regular procedure "not inconsistent with sections 762 to 765." We are not here concerned with sections 764 and 765.

Section 762 reads:

"The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

This is a clear and adequate provision for the bringing of suits against the United States, following the same procedure which began as far back as the Act of 1863.

Section 763 reads as follows:

"The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district [fol. 28] attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

It will be observed that this section applies indifferently to district courts and to the Court of Claims and that it contains not one word making compliance with any of these directions a condition of beginning action. The condition on which my brethren rely in holding that suits in the District Courts are not begun until process is served is found only "by implication". It seems to me unsound to read into a statute such an important provision in that way and to hold that this modification applies to one of two cognate courts but not to the other. The provisions of section 763 do not seem to me to be conditions at all under which the United States consents to be sued. Those conditions in this class of cases are found in the revenue laws, that there shall be a claim of overpayment, a claim for refund filed and disallowed, etc. The provisions referred to relate to service of process, etc.,—a distinctly different thing, having

no relation to jurisdiction unless explicitly given such a relation. I believe it to be not uncommon for statutes authorizing suits against a government, state or federal, to contain provisions of this character stating on which official [fol. 29] service should be made. It is settled that "brought" in section 762 means filing a petition if the suit is brought in the Court of Claims. I do not think it means something else if the suit is brought in the District Court which has concurrent jurisdiction under the same statutes.

A number of the cases cited in the government's brief and relied on by the District Judge have nothing to do with tolling the statutes of limitation; they do not seem to me in point.

[fol. 30]. RECITAL AS TO HEARING

On October 14, 1937, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—December 8, 1937

This cause came on to be heard October 14, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 8, 1937, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed with costs.

By the Court, Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter: Charles B. Rugg. File No. 42,128. U. S. Circuit Court of Appeals, First Circuit. Term No. 647. Bates Manufacturing Company, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed December 24, 1937. Term No. 647, O. T., 1937.

FILE COPY

No. 647

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In the Supreme Court of the United States

OCTOBER TERM, 1937

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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PRESS OF GEO. H. DEAN CO., BOSTON

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Bates Manufacturing Company, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above cause on December 8, 1937, affirming a judgment of the District Court of the United States for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court (R. 11-13.) is reported in 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 19.) is not yet reported.

JURISDICTION

The judgment of the court below was entered December 8, 1937. (R. 30.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an action against the United States in the District Court to recover taxes illegally collected is begun within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed in the District Court under Section 5 of the Tucker Act (U.S.C., Title 28, Sec. 762).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 12-14.

STATEMENT

The material facts set forth in the plaintiff's petition, which must be considered as admitted by the Government's motion to dismiss, together with other relevant facts of record, may be summarized as follows:

The plaintiff duly filed, within the applicable period of limitation, claims for the refund of income, excess profits, and war profits taxes paid by it for the calendar years 1917-1921 inclusive, and alleged to have been erroneously and illegally assessed and collected. (R. 2, 4, 6.) All of said refund claims were rejected by the Commissioner of Internal Revenue on March 22, 1927. (R. 2, 6.) On

March 21, 1929, the plaintiff filed in the office of the Clerk of the District Court of the United States for the District of Massachusetts a duly verified petition seeking judgment against the United States for the refund of $313,349.71, being a portion of the taxes referred to in said claims for refund. (R. 1-7.) A copy of the petition was served by counsel for the plaintiff on the United States Attorney for the District of Massachusetts on March 25, 1929, and on the same day a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States. (R. 7-8.) On March 28, 1929, counsel for the plaintiff filed in the office of the Clerk of the District Court an affidavit of the service and mailing of the petition and notice as above set forth. (R. 7.)

On May 16, 1929, the United States Attorney filed a general denial on behalf of the United States. (R. 8.) On May 4, 1937, the United States Attorney filed a motion to dismiss the petition on the ground that the cause of action was barred by the provisions of Section 3226 of the Revised Statutes, as amended by Section 1113(a) of the Revenue Act of 1926, and the court was, therefore, without jurisdiction to hear and determine the case. (R. 9.)

The District Court granted the Government's motion, holding that an action against the United States is not begun at least until a copy of the petition filed under Section 5 of the Tucker Act (*infra*, p. 13) has been served upon the United States Attorney in accordance with Section 6 of that Act (*infra*, p. 13), and that inasmuch as such service had not been effected in the instant case prior to the expiration of the period of limitation, the action

was barred. (R. 10-13.) The Circuit Court of Appeals affirmed the judgment of the District Court (R. 30), one judge dissenting (R. 26).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that a suit against the United States in the District Court under the Tucker Act is not begun, within the meaning of Section 3226 of the Revised Statutes, as amended, when the plaintiff's petition is filed with the Clerk of the District Court pursuant to Section 5 of the Tucker Act.

2. In holding that a suit against the United States in the District Court under the Tucker Act is not begun, within the meaning of Section 3226 of the Revised Statutes, as amended, until a copy of the plaintiff's petition is served upon the United States Attorney pursuant to Section 6 of the Tucker Act.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The question of what constitutes the beginning of a suit in the District Court under the Tucker Act, within the meaning of applicable statutes of limitations, is an important question of Federal law which has not been, but should be, settled by this Court. On that question, as the Circuit Court of Appeals for the Second Circuit pointed out in *Munro* v. *United States,* 89 F. (2d)

614, 616 (now pending before this Court on a writ of certiorari, October Term, 1937, No. 218): "The authorities are in some confusion." This diversity of opinion among the lower courts on the general question is twofold. First, there are conflicting views whether, because of the provisions of the Conformity Act, a suit under the Tucker Act can be considered to be begun if, within the applicable period of limitations, the local procedure prescribed for commencing actions in state courts is followed. That phase of the question is raised by the *Munro* case. There remains the aspect of the question presented by the instant case: if the procedure prescribed by the Tucker Act, rather than local practice, is exclusively followed, what step in that procedure marks the beginning of the suit. It is self-evident that that question is of widespread application, being potentially involved in many different classes of suits against the United States in the federal district courts throughout the country. A few district courts have held, as did the court below, that a suit under the Tucker Act is not begun until a copy of the petition is served upon the United States Attorney pursuant to Section 6 of that Act (*infra*, p. 13). *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.); *Bachmann, Emmerich & Co., Inc.* v. *United States* (S. D. N. Y.), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9427. These decisions contain no logical exposition of the reasons for holding that service of a copy of the petition marks the beginning of the suit for purposes of the statute of limitations. They indulge in broad generalizations as to the necessity for complying with

conditions imposed by the sovereign when it consents to be sued, relying principally on decisions holding the Conformity Act inapplicable to suits under the Tucker Act. Other district courts have repudiated the reasoning that the requirements of the Tucker Act, being jurisdictional, must all be complied with before suit can be deemed to be begun. Thus it has been held that the other requirements of Section 6, as to mailing a copy of the petition to the Attorney General and filing an affidavit of service and mailing, which appear to be just as mandatory as the requirement of service on the United States Attorney, are not prerequisites to the beginning of the suit, but may be satisfied after the institution of the action. *Little* v. *United States,* 54 F. (2d) 711 (W. D. La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M. D. N. C.); *Irving Trust Co.* v. *United States* (S. D. N. Y.), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9600; *Jones* v. *United States* (N. D. Ohio), not officially reported, but found in 1936 C.C.H. Federal Tax Service, Vol. 4, par. 9072.

A decision by this Court of the question presented in the instant case will supplement the Court's decision in *Munro* v. *United States,* October Term 1937, No. 218, and finally put at rest all doubts as to what does mark the commencement of a suit under the Tucker Act. In the *Munro* case the question whether service of a copy of the petition, in addition to filing the petition, is necessary to satisfy the statute of limitations was not directly before the lower court, since the plaintiff there neither filed his petition nor served a copy thereof in time. Nevertheless, that court in the course of its opinion

said (*Munro* v. *United States*, 89 F. (2d) 614, 616) that "the suit cannot be deemed to have been 'brought' until, at the least, a copy of the petition was served on the district attorney." Moreover, the Government, in its Brief in Opposition in the *Munro* case (p. 6) asserts, as an affirmative argument in support of its contention that service of a summons was not sufficient to commence the suit, that "at least the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period". Thus the precise issue involved in the instant case has been raised in the *Munro* case. That issue, as was remarked in the dissenting opinion below (R. 26), is one of general importance. We submit that it, as well as the question directly presented in the *Munro* case, should be finally settled by this Court, in order that the limitations upon bringing suit against the United States may be clearly defined.

2. In holding that Sections 5 and 6 of the Tucker Act define, by inference, the commencement of a proceeding under that Act, the decision below conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walton* v. *United States*, 73 F. (2d) 15. In the *Walton* case the court not only held that the Tucker Act contained no express definition of the beginning of a suit, but manifestly found no implication in the language of the statute in regard to that question, for it concluded that in the absence of a controlling act of Congress the question must be determined under the local law. Since the local statute provided that a civil action was commenced by service of a sum-

mons, the court held by analogy that a suit under the Tucker Act is commenced by service of a copy of the petition on the United States Attorney. Thus the two courts reached the same result, but by wholly inconsistent methods of reasoning. It is to be observed that application to the instant case of the principle laid down in the *Walton* case would have required a decision in favor of the petitioner, since under Massachusetts law the issuance, and not the service, of a writ marks the beginning of an action. *Pierce* v. *Tiernan,* 280 Mass. 180, 182. While we do not contend that the Circuit Court of Appeals for the Eighth Circuit was correct in applying local law, we submit that it was correct in concluding, as it clearly did conclude, that the result which it reached could not be said to flow from the provisions of the Tucker Act.

3. The decision below is erroneous. Since, as the court concedes (R. 25), the statutes do not expressly define the beginning of a suit, the intention of Congress must be determined by recourse to established principles of statutory interpretation. One such principle is that words used in a statute are to be given their ordinary meaning unless it is clear that they were intended to have some definite signification. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 327. In common parlance, to begin is to enter upon, or take the first step in, a course of action. The first step required in bringing suit under the Tucker Act is the filing of a petition (Section 5). Service of a copy of the petition thus filed is a subsequent step, prescribed by a subsequent section (Section 6). We submit, therefore, that taking the language of Section 3226 of the

Revised Statutes in its ordinary sense, and applying it to the procedure defined in the Tucker Act, the filing of the petition marks the beginning of the suit.

Other relevant principles of interpretation are that all acts of Congress must be read in the light of the common law (*United States* v. *Sanges,* 144 U.S. 310), and that language having a meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature (*Kepner* v. *United States,* 195 U.S. 100). As stated in the dissenting opinion below (R. 26) and in the Government's Brief in Opposition in the *Munro* case (p. 7), an action at common law is regarded as "brought" or "begun", within the meaning of statutes of limitations, when the judicial machinery is set in motion—that is, in most jurisdictions, when a writ or summons is issued with an honest intention to prosecute the suit diligently. *Brown* v. *Babbington,* 2 Ld. Raymond 880; *Pierce* v. *Tiernan,* 280 Mass. 180, 182; *Anderson* v. *Aetna Life Ins. Co.,* 75 N. H. 375; cf. *Gibson* v. *Pittsburgh Transportation Co.,* 311 Pa. 312. In equity, where the procedure is more closely analagous to the procedure under Sections 5 and 6 of the Tucker Act, the suit is commenced when the bill or petition is filed, provided there is no unreasonable delay in the service of process. *Linn & Lane Timber Co.,* v. *United States,* 236 U.S. 574; *Mound City Co.* v. *Castleman,* 187 Fed. 921, 925 (C.C.A. 8th). Thus in the judicially accepted sense, as well as in common parlance, an action is begun at the time when the first formal step required by the applicable procedure is taken. There is no reason to suppose that in enacting

Section 3226 of the Revised Statutes Congress intended to adopt a different rule.[1]

The court below, relying upon the principle requiring strict compliance with conditions upon which the sovereign consents to be sued, finds an "implication from the language employed" in Sections 5 and 6 of the Tucker Act that the suit is not begun until a copy of the petition is served on the United States Attorney. The language of those sections affords no basis for the suggested inference, and we submit that it finds no support in the principle referred to by the court. The question here is not whether there must be compliance with the provisions of Section 6, but whether there must be such compliance prior to the expiration of the period of limitations. If the reasoning of the court is sound, it would seem to follow that, before the action may be regarded as begun, there must be strict compliance with all the provisions of Section 6, and not merely the provision for service on the United States Attorney; but the court declined to express any opinion on that question (R. 25-26), and the Circuit Court of Appeals for the Second Circuit, in the *Munro* case, said only that there must "at least" be service on the United States Attorney. Moreover, in every case in which the provisions as to mailing a copy of the petition to the Attorney General and filing an affidavit of serv-

[1] Compare Section 1069 of the Revised Statutes (U.S.C., Title 28, Sec. 262), providing that a petition in the Court of Claims must be filed within six years after the claim first accrues, with Section 1 of the Tucker Act (24 Stat. 505), providing that a suit against the Government, whether in the Court of Claims or in the District Court, must be "brought" within six years after the right accrues. And see *Greathouse v. United States,* 166 U.S. 601, 606.

ice have been in issue, it has been held that those provisions are procedural and may be complied with or waived after the suit has been instituted. *Little* v. *United States,* 54 F. (2d) 711 (W. D. La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M. D. N. C.); *Irving Trust Co.* v. *United States* (S. D. N. Y.), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9600; *Jones* v. *United States* (N. D. Ohio), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 4, par. 9072.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES B. RUGG
H. BRIAN HOLLAND
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EVERETT H. MAXCY
Counsel for Petitioner

APPENDIX

Section 3226 of the Revised Statutes, as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9:

> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 24 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 41), derived from Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505:

> "SEC. 24. The district courts shall have original jurisdiction as follows:
>
> * * * * * * *

"Twentieth. Concurrent with the Court of Claims, * * * * * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * * * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * "

* * * * * * *

Act of March 3, 1887 (Tucker Act), c. 359, 24 Stat. 505, 506 (U.S.C., Title 28, Secs. 762 and 763):

"SEC. 5. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

"SEC. 6. The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and

shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. . . . ."

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No. 647

In the Supreme Court of the United States

OCTOBER TERM, 1937

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY MEMORANDUM FOR PETITIONER

CHARLES B. RUGG
Counsel for Petitioner

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In its Brief in Opposition to the Petition for Certiorari (p. 4) the Government suggests that if the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court on December 20, 1937, become effective, the question raised in the instant case will probably not arise in the future, and that consequently the question is not one of general importance. Reference is made to Rules 3 and 4, and to the footnote to Rule 4 contained in the Final Report of the Advisory Committee.

Rule 3 provides:

> "A civil action is commenced by filing a complaint with the court."

Rule 4 provides:

> "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. * * * "

The Government appears to be of the opinion that, whatever the rule now is under the Tucker Act, Rule 3 leaves no room for doubt that in the future the filing of the complaint will mark the commencement of the suit for purposes of statutes of limitations. This view, we submit, is erroneous.

A footnote to Rule 3 appearing in the Report of the Advisory Committee dated April, 1937, indicates that the Committee considered that the Rule left open the question whether the mere filing of a complaint would stop the running of a statute of limitations. In that footnote the Committee said:

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute or whether any further step is required, such as service of the summons and complaint or their delivery to the marshal for service."

As pointed out in a footnote to Rule 4 appearing in the Final Report of the Committee, that rule, as revised, reduces the chance of questions arising under statutes of limitations because there will be no appreciable delay between the filing of the complaint and the delivery of the summons to the person authorized to effect service. Nevertheless, it is clear that the Rules do not purport to settle the question.

Moreover, if the decision of the court below in the instant case is sound, there would appear to be grave doubt whether the Rules could settle that question as regards suits against the United States. The court below held in effect that service of a copy of the petition on the United States Attorney within the period allowed by the statute of limitations is one of the conditions upon which the United States has consented to be sued. If that is a correct interpretation of the Tucker Act, and service within the limitation period is in the nature of a jurisdictional requirement, then it would appear that such requirement could not be eliminated by the Rules. The enabling statute under which the Rules were adopted authorized this Court to prescribe merely procedural rules, and specifically provides that the rules shall not abridge, enlarge nor modify the substantive rights of any litigant.

Respectfully submitted,

CHARLES B. RUGG,
Counsel for Petitioner.

January, 1938

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 9-12) is reported in 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 16-22) is reported in 93 F. (2d) 721.

JURISDICTION

The judgment of the Court below was entered December 8, 1937 (R. 25). The petition for a writ of certiorari was filed on December 24, 1937 (R. 26) and was granted on January 31, 1938 (R. 25). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an action against the United States in the District Court to recover taxes illegally collected is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed in the District Court under Section 5 of the Tucker Act.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 33-40.

STATEMENT

The Government moved to dismiss a petition filed by the plaintiff in the District Court. The material facts set forth in said petition, which must be considered as admitted by the Motion to Dismiss, together with other relevant facts of record, may be summarized as follows:

The plaintiff filed within the applicable period of limitation claims for the refund of income, excess profits and war profits taxes paid by it for the calendar years 1917 to 1921, inclusive, and alleged to have been erroneously and illegally assessed and collected (R. 1, 2, 5). All of said refund claims were rejected by the Commissioner of Internal Revenue on March 22, 1927 (R. 1, 5). On March 21, 1929, one day prior to the expiration of the period for bringing suit, the plaintiff filed in the office of the Clerk of the District Court of the United States for the District of Massachusetts a duly verified petition seeking judgment against the United States for the refund of $313,349.71, being a portion of the taxes referred to in said claims for refund (R. 1-6, 14). A copy of the petition was served by counsel for the plaintiff on the United States Attorney for the District of Massachusetts on March 25, 1929, and on the same day a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States (R. 6-7). On March 28, 1929, counsel for the plaintiff filed in the office of the Clerk of the District Court an affidavit of the

service and mailing of the petition and notice as above set forth (R. 6, 14).

On May 16, 1929, the United States Attorney filed a general denial on behalf of the Government (R. 7, 14). On May 4, 1937, the United States Attorney filed a motion to dismiss the petition on the ground that the cause of action was barred by the provisions of Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926 (R. 8, 15).

The District Court granted the Government's motion, holding that an action against the United States is not begun at least until a copy of the petition filed under Section 5 of the Tucker Act (*infra*, p. 36) has been served upon the United States Attorney in accordance with Section 6 of that Act (*infra*, p. 37) and that inasmuch as such service had not been effected in the instant case prior to the expiration of the period of limitation the action was barred and the Court was without jurisdiction to entertain the suit (R. 9-12). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 16-22), one Judge dissenting (R. 22-25).

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred—

(1) In holding that a suit against the United States in the District Court under the Tucker Act is not begun within the meaning of Section 3226 of the Revised Statutes, as amended, when the plaintiff's petition is filed with the Clerk of the District Court pursuant to Section 5 of the Tucker Act.

(2) In holding that a suit against the United States in the District Court under the Tucker Act is not begun within the meaning of Section 3226 of the Revised Statutes, as amended, until a copy of the plaintiff's petition is served upon the United States Attorney pursuant to Section 6 of the Tucker Act.

(3) In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I. Section 3226 of the Revised Statutes requires that a suit to recover taxes shall be "begun" within two years after the disallowance of the claim for refund, but neither that section nor the provisions of the Tucker Act setting forth the procedure for suing the United States in the district courts define the beginning of a suit. It is therefore necessary to invoke the established principles of statutory interpretation as an aid to the determination of the legislative intent.

In common parlance to "begin" means to enter upon, set about, or take the first step, and the first decisive step required of a plaintiff under the Tucker Act is the filing of a petition. The ordinary meaning of the language should be adopted unless it clearly appears that the words were intended to have some other meaning. Service of a copy of the petition is the second step required by the Tucker Act, and there is nothing to indicate that the suit should not be regarded as begun until this second step is taken. In fact, the language and structure of the statute indicate that the suit is begun when the petition is filed.

Other statutes of limitations, containing language substantially the same as that found in Section 3226, have been held to be satisfied at a point short of service on the defendant. At common law, both in England and in this country, the "issuance" of a summons or other appropriate writ was regarded as the commencement of the action, and service within the limitation period was never required. In all cases, of course, the plaintiff must have had an honest intent to prosecute the action with diligence. While the procedure under the Tucker Act differs from that at common law, in that no summons is required, the judicial interpretation of statutes of limitations found in decisions under the common law furnishes a guide to the interpretation of the statutes here involved.

Decisions in equity cases are closely in point, since the Tucker Act procedure is almost identical with the procedure in equity. The equity rule is well settled, at least in the federal courts, which follow the English authorities, that the suit is commenced when the bill is filed. Although it has been stated in some cases that delivery of the subpoena to an officer for service marks the beginning of the suit, it has been held in the cases in which the issue was squarely presented that filing the bill is sufficient, provided the subsequent steps evidencing *bona fides* are taken with reasonable promptness. And the authorities all agree that the suit is begun at a point short of actual service.

In the absence of any provision clearly requiring that service be effected within the limitation period, Section 3226 of the Revised Statutes and Sections 5 and 6 of the Tucker Act must be construed in the light of the common law and equity decisions. When so construed, they clearly indicate that the suit is "begun" when the petition is filed.

The history of the statutes in question further indicates that filing the petition begins the suit. Prior to the enactment of the Tucker Act suits to recover taxes might be brought against collectors individually or in the Court of Claims. A suit in the Court of Claims was clearly begun by filing a petition, and the beginning of a suit against a collector was governed by the rules prevailing in the state courts. The Tucker Act was intended to provide another forum similar to the Court of Claims, with substantially the same jurisdiction and procedure, and the same limitations on suit. It would seem to require clear and specific language to indicate that the conditions which would satisfy the statute of limitations were intended to be different as between the Court of Claims and district courts sitting as courts of claims. The requirement that copies of the petition filed in the district court be served on the representatives of the Government does

not clearly indicate such intention. Service has always been required at common law and in equity, but it was never considered necessary to stop the running of statutes of limitations and Congress must have been well aware of that fact.

II. The court below was mistaken in finding in the language of the Tucker Act an implication that the suit is not to be regarded as begun at least until a copy of the petition has been served on the United States Attorney. The court based that inference on the principle requiring strict compliance with conditions upon which the sovereign has consented to be sued. But the question is not whether the provisions of the Tucker Act must be strictly observed. The question is *when* they must be observed. The fact that those provisions are mandatory does not warrant the conclusion that there must be compliance with them prior to the expiration of the period of limitations.

If the mandatory character of the provisions of Section 6 of the Tucker Act gives rise to the inference that suit is not begun until service is made on the United States Attorney, the conclusion is inescapable that suit is not begun until notice has been mailed to the Attorney General and an affidavit of service filed. The court below, however, found it unnecessary to pass on that question, and other courts have declined to follow the argument to its logical conclusion.

The court below further suggested that no jurisdiction is vested in the district court until the United States Attorney is served. Whether or not this be sound, we submit it is immaterial. Although in any litigation service is necessary to give the court jurisdiction over the defendant, the acquisition of such jurisdiction is not normally regarded as essential to stop the running of the statute of limitations. There is no reason for a different rule in actions against the sovereign.

Considerations of policy furnish no basis for the interpretation of the statutes adopted by the court below. Under our interpretation the Government is assured of notice of the suit within a reasonable time. It has sixty days from the date of service within which to answer. Practically, it can make no difference to the Government which interpretation is followed. Evidence of this is found in the case of actions against collectors of internal revenue, which are governed by local practice under the Conformity Act.

III. The authorities relied upon by the court below are neither weighty nor persuasive. In only three cases has the precise question been squarely raised and decided. In the only other decision by a Circuit Court of Appeals the court, being unable to find any controlling provision or inference in the federal statutes, decided the question under state law. The other two decisions were by district courts, which relied, erroneously as we contend, upon the principle of strict compliance with conditions governing suits against the sovereign. Statements in other cases are merely *dicta* and are not based on any analysis or extended consideration of the issue.

ARGUMENT

I.

APPLYING THE ESTABLISHED RULES OF STATUTORY INTERPRETATION, A SUIT UNDER THE TUCKER ACT IS "BEGUN" WHEN THE PETITION IS FILED IN THE DISTRICT COURT.

Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926 (*infra*, p. 39), provided that no suit to recover taxes should be begun after the expiration of five years from the date of payment "unless such suit or proceeding is begun within

two years after the disallowance" of a claim for refund. The question here is what constitutes the beginning of a suit, within the meaning of that section, when the suit is one brought against the United States in the district court.

Section 3226 does not define the commencement of a suit, nor does it contain any provision as to how a suit to recover taxes shall be brought. The procedure for prosecuting actions against the United States in the district courts, including actions to recover taxes, is prescribed by Sections 5 and 6 of the Tucker Act. Section 5 of that act provides that "in any suit brought" under the jurisdictional provisions now embodied in Section 24 (20) of the Judicial Code (formerly Section 2 of the Tucker Act) (*infra*, p. 38) the plaintiff shall file a duly verified petition setting forth the nature of his claim and certain other information. Section 6 provides that the plaintiff shall (1) cause a copy of the petition "filed under Section 5" to be served on the district attorney of the United States in the district wherein suit is brought, (2) mail a copy of the petition to the Attorney General by registered mail, and (3) thereupon file an affidavit of such service and mailing. These sections do not state which, if any, of the prescribed acts marks the beginning of the suit. They merely set forth the required procedure and do not purport to designate the point at which the suit is to be deemed instituted for purposes of statutes of limitations or for any other purpose. See *Walton* v. *United States*, 73 F. (2d) 15, 17 (C.C.A. 8th); *Spencer* v. *United States*, 14 F. Supp. 46, 47 (D. Mass.).

Since neither the statute of limitations itself nor the statute setting forth the procedure in suits against the United States in the district court defines the beginning or commencement of such a suit, the question becomes one of statutory interpretation, to be determined in accordance with established principles governing the interpretation of statutes.

A. Taking the words of the statutes in their ordinary sense, the filing of the petition is the beginning of the suit.

We consider first the language of Section 3226. It is well settled that words used in a statute are to be given their ordinary or popular meaning unless it clearly appears that they were intended to have some different signification. *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327. If this test be applied, clearly a suit under the Tucker Act is "begun" when the petition is filed. The word "begin", in common parlance, means to enter on, set about, do the first act or take the first step in a course of action. See *Webster's New International Dictionary* (2d Edition). The first decisive step required of a plaintiff under the Tucker Act is the filing of a verified petition. When that is done, the plaintiff has performed the first overt act called for; he has entered upon the suit. In the sense in which the word is ordinarily used, the suit has been "begun". See *Burton* v. *Buckeye Ins. Co.*, 26 Ohio St. 467, 469.

We submit that there is nothing on the face of the Tucker Act to indicate any intention on the part of Congress that something more than the filing of the petition should be required before the action could be regarded as begun. In fact, the inference to be drawn from the statute is that the filing of the petition is sufficient. The provisions for filing the petition and for service of copies thereof appear in separate sections of the act. The requirement that a petition be filed appears first, in Section 5. Upon the filing of the petition the case is docketed in court. (See Docket Entries, R. 14.) The proceedings have been formally opened, and the nature of the claim has become a matter of public record. The provisions of the statute in regard to service appear in Section 6. This latter section refers to the petition "*filed* under Section 5", thus making it clear that the petition must be placed on record with the court before

notice is given to the Government. The giving of such notice, by serving a copy of the petition on the United States Attorney and mailing a copy to the Attorney General, is the second step in the proceedings. This can be done only after the suit has been filed with the clerk, and become a part of the records of the court. It is a second step following a separate and distinct first step defined in a separate section of the statute. We submit that there is no justification to be found in the language or structure of the statute for concluding that the suit is not begun until this second step is taken.

Section 6 contains, in addition to provisions for notifying the Government of the action, provisions defining the procedure to be followed by the United States Attorney in defending the interests of the Government, and also the procedure to be followed in the event the United States Attorney is derelict in his duty. These provisions, requiring the entry of an appearance and the filing of an answer, and providing for determination of the merits of the plaintiff's claim if no answer is filed, clearly deal with acts to be performed after the suit has been begun, and have nothing to do with the commencement of the action. The grouping of those provisions in the same paragraph with the provisions for service of the petition indicates that they were all regarded as being in the same category of things to be done after the suit had been begun, as distinguished from the things required by Section 5 to be done in order to begin the suit. And we submit that it is entirely logical so to regard them. Thus the incorporation of the requirement as to filing the petition in a separate section from that containing the requirements as to service was evidently not merely a matter of convenience in drafting but a matter of logical grouping of the procedural steps into (1) those having to do with the commencement of the action and (2) those having to do with the prosecution of the action after it has been begun.

We submit, therefore, that not only do the statutes fail to disclose any intention on the part of Congress that service must be effected within the limitation period, but the language and structure of the Tucker Act give rise to the inference that the filing of the petition constitutes the beginning of the suit. That would certainly be the normal interpretation of the act, taking its words in their natural and ordinary sense. Any other conclusion requires a strained and unnatural interpretation which we submit is unwarranted.

B. The judicially sanctioned meaning of the word "begun", as applied to the commencement of actions, further shows that a suit under the Tucker Act is begun when the petition is filed.

Section 3226 of the Revised Statutes is substantially the same in its language as other statutes of limitations which have been construed by the courts in numerous cases. Such statutes commonly provide that suit shall be "begun", "brought" or "commenced" within a specified time, and it is clear that although different words may be used to describe the initiation of the proceedings, those words all have the same meaning. *Goldenberg* v. *Murphy,* 108 U. S. 162, 163. Decisions construing other statutes of limitations furnish, therefore, a guide to the intent of Congress in regard to statutes limiting the time for bringing suit against the Government, since language having an accepted meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature. *Kepner* v. *United States,* 195 U. S. 100. Moreover, it is a familiar rule of statutory interpretation that all acts of Congress are to be read in the light of the common law. *United States* v. *Sanges,* 144 U. S. 310. That rule would appear to be particularly relevant to the instant question in view of the historical origin of statutes of limitations.

The common law rule, prevailing in England and most of the states of this country, is that an action is begun, brought or commenced for purposes of the statute of limitations when the plaintiff takes the first step required of him under the common law practice. The purpose of the statute being to bar a party who has slumbered on his rights, an act of legal diligence by the plaintiff within the statutory period is deemed sufficient. In *Johnson* v. *Smith,* 2 Burr. 950, 961, Lord Mansfield said:

> "The statute did not intend to bar, unless the party had *acquiesced* for six years. But he who sued out a *latitat,* to bring the defendant into custody that he might declare against him, *did not acquiesce,* within the *true meaning* of the act; * * * * *"

And in *Society for Propagating the Gospel* v. *Whitcomb,* 2 N. H. 227, it was said (at p. 232):

> "Because suing out the writ with a view to service is an act of legal diligence within the time of limitation; it shows, that the party has not slumbered the period prescribed to bar his rights; and, therefore, rebuts the inference of payment, release, or other species of discharge, on which the statute is principally bottomed."

See also *Hail* v. *Spencer,* 1 R. I. 17, 21; *Johnson* v. *Farwell,* 7 Greenleaf, (Me.) 370, 374; *Randall* v. *Bacon,* 49 Vt. 20, 21, 22.

The first step in a common law action is the "issuance", "purchase" or "suing out" of a writ. That act and not service of the writ upon the defendant is, therefore, a sufficient commencement of the action to bar the running of the period of limitations. Such was the rule in England. *Johnson* v. *Smith,* 2 Burr. 950; *Brown* v. *Babbington,* 2 Ld. Raymond, 880; *Parsons* v. *King,* 7 Term Rep. 6; *Beardmore* v. *Rattenbury,* 5 Barn. & Ald. 452; Wood, *Limitations* (4th Edition), Sec. 289. The same rule has been followed in most of our states in the absence of

express statutory provision otherwise defining the commencement of an action. In *Hail* v. *Spencer*, 1 R. I. 17, it was said (pp. 18, 20):

> "Our act of limitations seems to be not materially different from the English statute, adopted as early as the reign of James I. And it seems to be reasonable to conclude that the English construction was perfectly understood by our legislature. If, therefore, the language of both statutes is substantially the same, our legislature must have used the language with a view to the meaning given to it by English courts. In fact the principles of the decisions of those courts have been uniformly recognized in ours, as truly expounding the meaning of the act. If the issuing of the English *capias* be considered in the common pleas, then, the commencement of the suit, (and it in fact is in all cases where an outlawry is not contemplated) there can be no good reason why the issuing of our writ of arrest, or original summons, (which takes the place of the arrest) should not, on like principles, be deemed the commencement of the suit. * * *
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> "We have been unable to ascertain, that in any state, with the exception of Connecticut, the service of the writ is considered the commencement of the action. It is believed, that all other states consider the issuing of the writ as the commencement of the suit. * * *"

Where the process is issued by the court itself upon the filing of a praecipe or docketing of the case, as, for example, in Pennsylvania, the action is deemed commenced when the praecipe is so filed. *Gibson* v. *Pittsburgh Transportation Company*, 311 Pa. 312. See also *Lawrence* v. *Winifrede Coal Co.*, 48 W. Va. 139; *Bank of the United States* v. *Lyles*, 10 Gill & J. (Md.) 326. Where the "issuance" of the writ is simply the filling out of a blank form by the plaintiff's attorney himself, perhaps in his own office, or the procuring of a writ from the clerk, the

courts differ somewhat as to when the writ is issued. "Issuance" requires a *bona fide* and unconditional intention to have the writ served. In some jurisdictions that may not be shown unless steps have been taken to put it into the hands of an officer for service; although actual delivery to the officer is probably not required. See *Burdick* v. *Green,* 18 Johns. (N. Y.) 14, 20; *Mutual Savings Fund Harmonia* v. *Gunne,* 110 N. J. L. 41; *United States* v. *Northern Finance Corp.,* 16 F. (2d) 998, 999 (C. C. A. 2d). But in most jurisdictions, the date on which the writ is made out is *prima facie* the date it is issued. Such is the rule in Massachusetts: *Gardner* v. *Webber,* 17 Pick. 407; *Pierce* v. *Tiernan,* 280 Mass. 180, 182; *Cincotta* v. *Dupuy,* Mass. Adv. Sh. (1936) 991 (1 N. E. (2d) 182); in New Hampshire: *Society for Propagating the Gospel* v. *Whitcomb,* 2 N. H. 227; *Anderson* v. *Aetna Life Insurance Society,* 75 N. H. 375; *Mason* v. *Cheney,* 47 N. H. 24; in Maine: *Johnson* v. *Farwell,* 7 Greenleaf 370; in Vermont: *Day* v. *Lamb,* 7 Vt. 426; *Chapman* v. *Goodrich,* 55 Vt. 354; in Rhode Island: *Hail* v. *Spencer,* 1 R. I. 17; and in North Carolina: *Haughton & Booth* v. *Leary,* 20 N. C. 21. See also *Jincey* v. *Winfield's Adm'r.,* 9 Gratt. (Va.) 708, 721. All the jurisdictions, however, with the exception of Connecticut, agree that it is the issuing of the writ and not service upon the defendant that marks the commencement of an action at common law. This rule is subject to the requirement that the writ must actually be served within a reasonable time. Thus there is no possibility that an action may be begun and kept pending for an indefinite period without the knowledge of the defendant and suddenly be pressed years later when it suits the plaintiff's convenience. The necessity for service within a reasonable time after the issuance of the writ safeguards the defendant against this danger.

While the procedure under the Tucker Act differs from common law procedure in that no summons or other writ is required, the principles laid down in the decisions at

common law are readily applicable here. In those cases the statutes of limitations were construed as requiring the plaintiff by formal act to invoke the intervention of the courts. This requirement was held to be satisfied when the plaintiff took the first procedural step, provided he manifested diligence in the further prosecution of the action. Under the Tucker Act the first procedural step is the filing of a petition, an act which shows even more significantly than the mere taking out of a writ that the plaintiff does not "acquiesce".[1]

The decisions in equity cases furnish even stronger support for our interpretation of the statutes involved here. In equity, as under the Tucker Act, the first step required of the plaintiff is the filing of a petition or bill of complaint. The subsequent steps are almost identical under the two forms of practice, equity requiring the service of a subpoena and the Tucker Act calling for service of a copy of the petition. The equity rule as to the commencement of the proceedings is succinctly stated in *Mound City Co.* v. *Castleman,* 187 Fed. 921, 925 (C.C.A. 8th):

> "A suit is commenced by the filing of the petition or bill with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of the process."

Such has long been the rule in England since it was provided in 4 Anne, c. 16, sec. 22, that the bill must be filed before process will issue. *Coppin* v. *Gray,* 1 Y. & C. 205; see also *Purcell* v. *Blennerhasset,* 3 Jo. & Lat. 24. And the same rule is now firmly established in the federal

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[1]The Court of Claims has observed that a petition filed in that court performs the functions of both declaration and process, and the same would appear to be true of petitions filed in the district courts under the Tucker Act. *Duran* v. *United States,* 31 C. Cls. 353, 358.

courts in this country. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, 578; *United States* v. *Hardy*, 74 F. (2d) 841 (C.C.A. 4th); *Equitable Life Assurance Society* v. *Schwartz*, 42 F. (2d) 646 (C.C.A. 5th); *Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co.*, 21 F. (2d) 588 (W.D.N.Y.); *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.*, 184 Fed. 199 (C.C.A. 8th); *Humane Bit Co.* v. *Barnet*, 117 Fed. 316 (C.C.N.J.). While it is sometimes broadly stated that not only must the bill be filed, but the subpoena must also be lodged with the proper officer for service (see *United States* v. *American Lumber Co.*, 85 Fed. 827 (C.C.A. 9th); *United States* v. *Miller*, 164 Fed. 444 (C.C.D. Oregon); *United States* v. *Northern Finance Corp.*, 16 F. (2d) 998, 999 (C.C.A. 2d)), it has been held in the cases in which the point has been squarely presented that the mere filing of the bill stops the running of the statute of limitations. *United States* v. *Hardy, supra; Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co., supra;* cf. *Armstrong Cork Co.* v. *Merchants' Refrigerating Co., supra.* See also *Farmers' Loan & Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 60. In a recent equity suit brought by the Government to collect taxes from transferees of the taxpayer, the suit was held to have been begun within time by the filing of the bill although process did not issue until after the period of limitations had expired. *United States* v. *Adams*, 92 F. (2d) 395 (C.C.A. 5th). And the cases all agree that the suit is commenced at a point short of service of the subpoena.

In this connection it should be noted that Equity Rules 12, 13 and 15 require that after the bill has been filed a subpoena shall be issued and served on the defendant. Notwithstanding this requirement, which has the force of law (*Roosevelt* v. *Missouri State Life Ins. Co.*, 70 F. (2d) 939, 945 (C.C.A. 8th)), this Court and other federal courts have held that service on the defendant is not essential to the commencement of the suit.

Thus the word "begun", considered as a word of art, has substantially the same meaning as in common parlance. In view of the wealth of authorities both at law and in equity, holding that service of process is not essential to stop the running of statutes of limitations, it is difficult to perceive any basis for ascribing a different meaning to the limitation provisions of Section 3226. There is nothing in the language of that section indicating that Congress intended to depart from the established rule. Nor, we submit, is any such purpose disclosed by the language of either Section 5 or Section 6 of the Tucker Act, which do not purport to deal with questions of limitations, but merely state the procedure to be followed in suing the Government. On the contrary, there would appear to be a strong inference that the limitation provision of Section 3226 is satisfied by the filing of the petition.

C. The statutory history of the provisions in question further indicates that the filing of the petition under the Tucker Act is the beginning of the suit.

If we look at the provisions of Section 3226 of the Revised Statutes and of Sections 5 and 6 of the Tucker Act in the light of their historical setting, we find further evidence that Congress intended the filing of the petition in the district court to constitute the beginning of the suit.

Section 3226 of the Revised Statutes, of course, antedates the Tucker Act. In its original form it forbade the maintenance of a suit in any court for the recovery of any internal tax alleged to have been illegally or erroneously assessed or collected until appeal should be made to the Commissioner of Internal Revenue and a decision of the Commissioner had thereon, provided, that if the decision were delayed more than six months, suit might be brought without a decision within the time limited by

Section 3227. The latter section provided that no such suit should be maintained in any court "unless the same is brought within two years next after the cause of action accrues."

At the time these sections were adopted one avenue open to taxpayers for the recovery of taxes illegally or erroneously collected was a common law action of assumpsit against the collector in the state or federal courts. *City of Philadelphia* v. *The Collector,* 5 Wall. 720; *The Collector* v. *Hubbard,* 12 Wall. 1; *Elliott* v. *Swartwout,* 10 Peters 137. Such actions, although in form against the individual collector, in substance were a method of recovering against the United States. *City of Philadelphia* v. *The Collector,* 5 Wall. 720, 733; *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380, 381. In limiting the right to such recovery, Congress might itself have defined the procedure and required that certain steps in that procedure be taken within the period of limitations. It did not do so. It was content to provide simply that action be "brought" within the time limited, leaving the question of when it was "brought" to be determined by the rules prevailing in the several states. The normal rule, as we have pointed out above, was that a common law action was "brought" or "begun" upon the issuance of the writ, or summons. With this rule Congress was, of course, perfectly familiar.[2]

The second avenue open to the taxpayer was by suit in the Court of Claims to recover the amount allowed by the Commissioner of Internal Revenue on the appeal made to him pursuant to R. S. §3226. *United States* v. *Kaufman,* 96 U. S. 567; *United States* v. *Savings Bank,* 104 U. S.

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[2] *Cf.* Section 643 of the Revised Statutes, providing for removal of suits against collectors to the circuit courts, which prescribes the duty of the clerk of the circuit court "When the suit is commenced in the State court by summons, subpoena, petition or another process except capias . . ." and "When it is commenced by capias or any other similar form of proceeding by which a personal arrest is ordered . . ."

728. The method of beginning suit in that court was by the filing of a petition in the form prescribed by Section 1072 of the Revised Statutes. That the filing of such a petition was sufficient for the purposes of the statute of limitations is manifest from Section 1069 which provided that every claim cognizable in the Court of Claims should be barred "*unless the petition* setting forth a statement thereof *is filed in the court or transmitted to it* by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law" within six years. (Italics ours.) The taxpayer, therefore, would have "brought" his suit in the Court of Claims as soon as he had filed his petition.

In enacting Sections 3226 and 3227 of the Revised Statutes, therefore, Congress did not purport to adopt any new rule as to what steps the taxpayer must take to bring his suit within the time limited. The right to sue was conditioned upon prompt bringing of the suit. But when suit was to be deemed "brought" was to be determined by the rules prevailing in the courts where the taxpayer sued.

When the Tucker Act was enacted, the conditions on the right to sue for the recovery of taxes were thus well defined. That Act did not impose new conditions on the right nor deal directly with the statute of limitations applicable to it. The Act did create a new forum in which that right might be exercised and provided a procedure for that forum. And it seems to be contended that the necessary effect of the procedure was to require a taxpayer to do something in addition to what had previously been required in order to "bring" his suit.

No such change was effected so far as suit in the Court of Claims was concerned. Section 1 of the Act redefines the jurisdiction of that Court. But it does not change the procedure by which suits in that court were to be instituted. See *Chase* v. *United States*, 155 U. S. 489, 500. Before the Tucker Act, as we have pointed out, a suit was

brought in the Court of Claims by the filing of a verified petition. After the Tucker Act, the rule remained the same. Section 1 of that Act contained a general proviso that no suit "shall be allowed under this act unless the same shall have been brought within six years after the right accrued". But since there was nothing in the Act to indicate that a suit should be "brought" in a different way than had been the rule theretofore, the filing of a petition must still have constituted the bringing of suit. And that is clearly the rule today. See Sec. 156 of the Judicial Code (U. S. C., Title 28, Sec. 262).

In creating the new forum in which suits might be brought against the government—the district and circuit courts of the United States—it was certainly competent for Congress to have provided that something more was necessary to constitute the "bringing" of suit in those courts than was required in the Court of Claims. But, we submit, such an intention is not lightly to be inferred. The whole scheme of the Tucker Act was that suits might be brought in either of the two forums indifferently. In exercising their jurisdiction under the Tucker Act the district and circuit courts were simply "sitting as courts of claims". *Reid* v. *United States,* 211 U. S. 529, 534. The jurisdiction, procedure, and method of review in the Court of Claims and the district and circuit courts were to be similar. Section 2 of the Act vests in the district and circuit courts "concurrent jurisdiction". No matters were cognizable by them which fell outside the jurisdiction of the Court of Claims. See *United States* v. *Jones,* 131 U. S. 1. The method of direct review by this Court of decisions of both courts was the same. *United States* v. *Davis,* 131 U. S. 36; *Chase* v. *United States,* 155 U. S. 489; *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458. The requirement for specific findings of fact and the scope of review of such findings was the same. See *Chase* v. *United States,* 155 U. S. 489, 500. One would not expect, therefore, that Congress would have provided

a different statute of limitations in one forum than in the other. Nor did it do so.

In *United States* v. *Greathouse,* 166 U. S. 601, 606, this Court had to consider whether the provisions of Section 1069 of the Revised Statutes, as to the tolling of the statute of limitations in suits in the Court of Claims when the claimant is under certain disabilities, was repealed by the proviso in Section 1 of the Tucker Act requiring suits to be brought within six years. In holding that the disability provisions were to be read into the limitations proviso in the Tucker Act, this Court said (at p. 606):

> "We may add that it was not contemplated that the limitation upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims."

That this construction accurately represented the intention of Congress is evident from the fact that when the provisions of Section 2 of the Tucker Act were reenacted in Section 24 (20) of the Judicial Code, *infra,* p. 38, the proviso as to tolling the statute in event of disability was expressly written into the law as to suits in the district courts.

Thus the period of limitations as well as the jurisdiction, procedure and provisions for review were identical in both courts.

To have imposed a condition precedent to the "beginning" or "bringing" of a suit in the district and circuit courts which did not exist in the Court of Claims would have been quite inconsistent with the general theory of the Tucker Act. Congress might nevertheless have done so. But it would seem to require clear and specific language to overcome the natural inference that such was not its intention. Such language, we submit, is not to be found in the Act.

The argument that Congress intended to impose an additional condition on the "beginning" of suit in the dis-

trict courts is founded simply on the fact that it required the plaintiff in such a suit to serve the petition, mail a copy to the Attorney General and file an affidavit of such service and mailing. These steps were not required of the plaintiff in the Court of Claims because under the practice of that court the clerk forwards a copy of the petition to the Attorney General. But, we submit, the requirement that these additional steps be taken in suits in the district court is no indication at all that Congress intended them to affect the operation of the statute of limitations in that court. They are normal procedural requirements. In common law actions and in suits in equity it is always necessary that the defendant be served and usually that he be furnished with a copy of the pleading. These requirements, as we have already shown, do not constitute conditions to the "beginning" or "bringing" of suit for purposes of the statute of limitations. Certainly had Congress intended to provide that the limitation period should operate differently in district courts than in the Court of Claims, it would have found a more apt way of expressing its intention than by providing for service and notice which normally have no effect upon the question of limitations. It cannot have intended to lay a trap for the unwary and to alter the application of Sections 3226 and 3227 of the Revised Statutes under the guise of procedural requirements having no such apparent effect.

II.

THE FACT THAT THE STATUTES HERE INVOLVED RELATE TO SUITS AGAINST THE GOVERNMENT DOES NOT JUSTIFY THE INTERPRETATION PLACED UPON THEM BY THE COURT BELOW.

The court below, conceding that neither Section 3226 of the Revised Statutes nor any provision of the Tucker Act expressly defines the commencement of a suit against the United States, found in Sections 5 and 6 of the Tucker

Act an implied provision that suit is not begun at least until a copy of the petition is served on the United States Attorney. (R. 21.) Clearly nothing in Section 3226 supports that implication. Equally clearly, we submit, nothing in the language of Sections 5 and 6 of the Tucker Act could be regarded as giving rise to such an implication if that Act were concerned with suits between private individuals. Service upon defendants, in addition to the filing of a petition or complaint, is universally required under our system of jurisprudence even in the absence of statute, and the necessity for service at some stage of the proceedings has always been recognized by the courts which have held that service is not essential to the *commencement* of the action.

The opinion below makes it clear that the implied requirement which the court found in the Tucker Act was based, not simply on the language of the act taken in either its ordinary sense or in its technical legal sense, but on the general principle that there must be strict compliance with conditions upon which the sovereign has consented to be sued. Solely because of that principle the court concluded that the filing of the petition was not sufficient to stop the running of the statute of limitations, but that there must also be service upon the United States Attorney within the statutory period. No such inference was found in *Walton* v. *United States,* 73 F. (2d) 15 (C.C.A. 8th) where the court held that in the absence of a controlling act of Congress the question must be determined under the local law.

We submit that the principle invoked by the court does not support its interpretation of the statutes. Conceding that the provisions of Section 6 of the Tucker Act are mandatory and must be complied with, it does not necessarily follow that they are "conditions precedent to the *bringing* of the proceeding against the United States" (R. 21. Italics ours). The question here is not whether those conditions must be strictly observed. The peti-

tioner in the instant case complied with them meticulously. The question is *when* they must be observed, and we submit that their mandatory character is not determinative of that question.

The fallacy in the reasoning of the court below lies in its failure to distinguish between conditions on the right to *begin* suit and conditions on the right to *maintain* suit. We submit that none of the provisions of Sections 5 and 6 of the Tucker Act can properly be regarded as conditions on the right to bring suit. The filing of the petition is the act constituting beginning of suit rather than a condition precedent to the beginning of the suit. Examples of conditions precedent to the commencement of a suit against the United States for the recovery of taxes include such requirements as the filing of a claim for refund and a delay of six months thereafter to afford the Commissioner an opportunity for adequate consideration of the claim. See *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. The provisions of Section 6 of the Tucker Act in regard to service on the United States Attorney and the Attorney General and the filing of notice thereof are in the nature of conditions subsequent. A suit properly begun by compliance with the provisions of Section 5 might abate on the failure to observe these subsequent requirements of Section 6. But they are not prerequisites to beginning the suit. Rather they are requirements that must be met in order to maintain a suit already begun, so as to uphold it, continue it on foot and prevent it from collapse. See *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 377. Thus even though the provisions of Section 6 are conditions on the waiver of sovereign immunity from suit, the principle of strict compliance clearly does not warrant the conclusion that they must be complied with before the suit may be deemed to have been begun.

To the objection that the statutes do not expressly state that the petition must be served within the limitation

period, the court replies that the same is true as to the time of filing the petition. We submit that this does not answer the objection. Manifestly, either the filing of the petition or some subsequent act must mark the beginning of the suit. Our contention is that the filing would normally be regarded as the commencement of the action, and that it should be so regarded in the absence of express statutory provision that the suit is not begun until some other act is performed. The absence of a provision as to the time for filing the petition clearly does not support the conclusion that the petition must be served within the limitation period.

If the fact that the provisions of Section 6 of the Tucker Act are mandatory warrants the inference that the action is not begun until service is made on the United States Attorney—and no other basis for that inference is suggested by the court below—then it logically follows that the statute of limitations is not satisfied until a copy of the petition has been mailed to the Attorney General and an affidavit of service been filed. These latter requirements appear in the same section and in the same sentence of that section as the requirement for service on the United States Attorney, and would seem to be equally mandatory. The court below found it unnecessary to pass upon that question (R. 22). Other courts have shown reluctance to follow the argument to its logical conclusion. Thus in *Munro* v. *United States*, 89 F. (2d) 614, affirmed by this Court on January 31, 1938, October Term, 1937, No. 218, the Circuit Court of Appeals expressed the opinion, which was not necessary to its decision, that there must "at the least" be service on the United States Attorney (p. 616). In cases in which the issues have been squarely presented it has been held that the provisions for notice to the Attorney General and filing an affidavit of service are not jurisdictional but may be waived by the representative of the Government or may, if not waived, be complied with after jurisdiction

has vested in the Court and *a fortiori,* it would seem, after the proceedings have been commenced. *Little* v. *United States,* 54 F. (2d) 711 (W.D.La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M.D.N.C.); *Jones* v. *United States,* (N.D. Ohio) not officially reported, but found in 1936 C.C.H. Federal Tax Service, Vol. 4, par 9072; *Hostetter* v. *United States* (W.D. Pa.) not officially reported, but found in 1937 C.C.H. Federal Tax Service, Vol. 4, par. 9436. In *Irving Trust Co.* v. *United States* (S.D. N.Y.) not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9600, the court held that Section 3226 of the Revised Statutes had been satisfied notwithstanding failure to file an affidavit of service within the statutory period. If compliance with these requirements is not essential to the commencement of the suit, then the reasoning of the court below is clearly inadequate to support its decision. See also, *United States* v. *Hvoslef,* 237 U. S. 1; *Griffin's Case,* 13 C.Cls. 257.

It is suggested by the court below that jurisdiction is not acquired by the district court until the United States Attorney has been served, and there is an inference that the statute of limitations is not satisfied until jurisdiction vests (R. 21). It is not altogether clear what jurisdictional requirements the court has in mind. Section 24 (20) of the Judicial Code (*infra,* p. 38) confers jurisdiction of the subject matter of the suit. If the court regards service on the United States Attorney as conferring on the district court "personal" jurisdiction over the Government, that concept does not support the conclusion that the statute of limitations is not satisfied until such jurisdiction is acquired. The authorities cited *supra* at pages 12-16 show conclusively that the acquisition of personal jurisdiction by service on the defendant is not normally regarded as essential to the commencement of the action, although it is essential to its maintenance. See also *United States* v. *Chase Securities Corp.,*

24 F. (2d) 500 (C. C. A. 1st); *Vincent* v. *McElvain*, 304 Ill. 160. And if the court has reference to the jurisdictional character of statutes limiting actions against the sovereign, it is clearly begging the issue to say that jurisdiction did not vest because the suit was not timely begun.

Reasons of convenience or policy furnish no basis for the implication read into the Tucker Act by the court below. The filing of the petition is adequate evidence of diligence on the part of the plaintiff. Under the rule established at common law and in equity the defendant is assured of notice within a reasonable time. Under Section 6 of the Tucker Act the time for filing an answer runs from the date of service on the United States Attorney, so that delay in service cannot prejudice the Government in preparing its pleadings. And it would be fantastic to suggest that a further delay of a few days, or such time as the court might hold to be reasonable under all the circumstances, after the filing of the petition and before service, would inconvenience the Government in obtaining or preserving evidence. In this respect the Government is in no different position from any other litigant. From a practical standpoint, it can make no difference to the Government whether the action is held to be commenced by the service of the petition or by its filing. This is clearly demonstrated by the fact that no uniform practice has been established for suits against collectors of internal revenue. Such suits, being actions between private individuals, are governed by local practice pursuant to the Conformity Act, and the local practice may or may not require service before the suit is deemed to be begun. Although the Government is the real party in interest in such cases, we are not aware that it regards its rights as being prejudiced in those states in which the issuance of a summons or the filing of a complaint constitutes the beginning of the action.

We submit, therefore, that there is no justification for interpreting the statutes here involved in a manner different from that in which other limitation statutes have been construed. Neither the statutory language nor general principles governing suits against the sovereign warrant a departure from the usual rule that an action is commenced when the first procedural step is taken. Had Congress intended otherwise it could readily have so provided. In the absence of express provision, or language giving rise to a clear inference, it must be held that the statute of limitations was satisfied by the filing of the petition.

III.

THE AUTHORITIES CITED BY THE COURT BELOW AND OTHERS COMMONLY RELIED ON IN SUPPORT OF THE GOVERNMENT'S CONTENTION ARE NEITHER WEIGHTY NOR PERSUASIVE.

The court below cites several cases in support of its holding that by implication the language of the Tucker Act requires that there must be both filing and service of the petition before the proceeding is begun (R. 21). In only three of those cases, and we have been unable to find any others, was the present question squarely raised and decided. *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th); *Creasy* v. *United States,* 4 F. Supp. 175 (W. D. Va.); *Bachmann, Emmerich & Co. Inc.* v. *United States* (S. D. N. Y.), decided June 4, 1935, not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9427. In *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th), a petition was filed in time, but no service was made until after the statutory period had expired. The court not only held that there was no express provision in the Tucker Act defining the beginning of a suit, but found no implication in the language of the Act in regard to that question, for it concluded that in the absence of a controlling act of Congress the question might

be determined by the local law. Since the local statute provided that a civil action was commenced by service of a summons, the court held by analogy that a suit under the Tucker Act is commenced by service of a copy of the petition on the United States Attorney.

In the second of these cases, *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.), it was held that the filing of the petition did not satisfy the statute of limitations applicable to suits on policies of war risk insurance when service was not effected until two days after the period had run. This result was reached upon the ground that since suits against the United States were solely by its permission, the procedure prescribed must be literally complied with. The reasoning of the court is hardly persuasive. It seems to have proceeded under the misapprehension that the Tucker Act specifically provided what constitutes the beginning of a suit, since it stated (p. 179):

> "It is provided in title 38, §445, U. S. C., 38 U. S. C. A. §445 (by reference to title 28, §763), that suit shall be begun by causing a copy of the petition to be served upon the district attorney of the United States in the district where suit is brought, and causing an affidavit of such service to be filed with the Clerk of court."

To paraphrase the language of Section 763 in this manner is, we submit, to assume the answer to the very question in controversy.

The third case is *Bachmann, Emmerich & Co. Inc.* v. *United States* (S. D. N. Y.), decided June 4, 1935, not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9427. That was a tax refund suit, in which the petition was seasonably filed but not served until a few days after the statute had run. The court granted a motion to dismiss, on the theory, which we have urged is erroneous, that since there must be strict compliance with the statutory provisions, all of the requirements of Sections 5 and 6 of the Tucker Act must be met before the suit can be regarded as commenced.

These authorities and the court below refer to and rely upon a number of other cases in support of the view that in a suit under the Tucker Act service of the petition must be made before the expiration of the statutory period. Some of the cases relied upon contain dicta to that effect. Others neither discuss nor involve any question of the statute of limitations.

The earliest, and perhaps most frequently cited, case is *Reid Wrecking Company* v. *United States*, 202 Fed. 314 (N. D. Ohio) in which the sole point raised was whether proceedings against the United States should be quashed on the ground that they were not brought in the district where the plaintiff resides, as required by Section 5 of the Tucker Act, the point having been timely raised by the Government. The statute of limitations was in no way involved or referred to by the court. The case is authority merely for the proposition that the mandatory requirements of Section 5 of the Tucker Act, being conditions on the consent of the United States to be sued, must be complied with if promptly insisted upon by the Government.

National Casket Company v. *United States*, 263 Fed. 246 (S. D. N. Y.) and *Cassarello* v. *United States*, 265 Fed. 326 (M. D. Pa.) are also commonly cited in support of the requirement of service of the petition before the expiration of the statutory period. In these cases the only question was whether the provisions of the Tucker Act were at all applicable to suits against the Government under the Lever Act and under an act providing for suits on war risk insurance policies, Act of October 6, 1917, respectively, both statutes being silent on the question. In holding that the Tucker Act procedure governed, the courts had no occasion to, and did not, discuss which of the procedural steps prescribed by that Act marks the beginning of the suit for purposes of the statute of limitations.

Finally there is a group of cases in which the courts stated, although the point was not before them for decision, that service of the petition marks the commencement of a suit under the Tucker Act. *Miller* v. *United States,* 11 F. Supp. 924, 925 (W. D. N. Y.); *Henry* v. *United States,* 15 F. Supp. 651, 652; *Munro* v. *United States,* 89 F (2d) 614, 616 (C. C. A. 2d), aff'd, October Term, 1937, No. 218; *Spencer* v. *United States,* 14 F. Supp. 46, 47 (D. Mass.). In all these cases except the *Spencer* case, the point at issue was whether a suit on a war risk insurance policy might be instituted by issuance and service of summons in accordance with local practice by virtue of the Conformity Act. In the *Spencer* case, the question was whether the signing and verification of a petition was sufficient to commence suit, the plaintiff having died before the petition was filed. In none of these cases was it material to discuss the necessity of serving as well as filing the petition to stop the running of the statute of limitations. Nor did the courts purport to consider or discuss that problem with any fullness. These casual statements to the effect that service of the petition marks the commencement of the suit were made without any analysis or extended consideration of the issue. They are based in large measure simply on the ground that the requirements of the Tucker Act are mandatory and in reliance on the authority of the *Reid, National Casket Co.* and *Cassarello* cases which do not deal with the point. These dicta, we submit, are neither weighty nor persuasive.

Manifestly the decision of this Court in *Munro* v. *United States,* October Term, 1937, No. 218, does not cover the instant case. The affirmance of the decision of the Circuit Court of Appeals cannot, of course, be construed as an approval or adoption of the dictum in its opinion, that the requirement of service must be met before the period of limitations has run. Nor is there anything in the opinion of this Court to that effect. The statement in

the opinion that the requirements of neither Sections 5 or 6 were complied with within the period of limitations was simply a statement of fact. It was not intended, we submit, to indicate that, if the requirements of Section 5 as to filing a petition had been met in time, the suit would nevertheless have been barred for failure to serve within the statutory period.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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February, 1938.

APPENDIX

Revised Statutes, Chapter Twenty-One, dealing with the jurisdiction powers and procedure of the Court of Claims, provided in part:

"SEC. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, eighteen hundred and sixty-three, chapter one hundred and twenty, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' or by the act of July two, eighteen hundred and sixty-four, chapter two hundred and twenty-five, being an act in addition thereto: *Provided,* That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property

in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: (*Provided also,* That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy engaged in the suppression of the rebellion.)"

"SEC. 1060. All petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the House in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims."

"SEC. 1069. Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided,* That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

"SEC. 1072. The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in Congress, or by any of the Departments, if such action has been had; what persons are owners there-

of or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent, or attorney."

Act of March 3, 1887 (Tucker Act), c. 359, 24 Stat. 505, 506, provided in part:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims', or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

* * * * *

SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided,* That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

Section 1059 of the Revised Statutes and Section 1 of the Tucker Act, defining the jurisdiction of the Court of Claims, were repealed by Section 297 of the Judicial Code.

The jurisdictional provisions with respect to the Court of Claims are now found in Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250).

Section 1069 of the Revised Statutes, requiring claims to be filed in the Court of Claims within six years, and Section 1072 of the Revised Statutes, prescribing the filing of a verified petition in the Court of Claims, were repealed by Section 297 of the Judicial Code and now appear without change in Sections 156 and 159 of the Judicial Code, respectively (U. S. C., Title 28, Secs. 262 and 265).

Section 2 of the Tucker Act, as amended, vesting in the district courts concurrent jurisdiction with the Court of Claims, was repealed by Section 297 of the Judicial Code, and is now found in U. S. C. Title 28, Section 41(20) (Judicial Code Section 24 (20) as amended), reading as follows:

"*Section* 41. (*Judicial Code, section* 24, *amended.*)

Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * * * *

"(20) *Suits against United States.* Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and de-

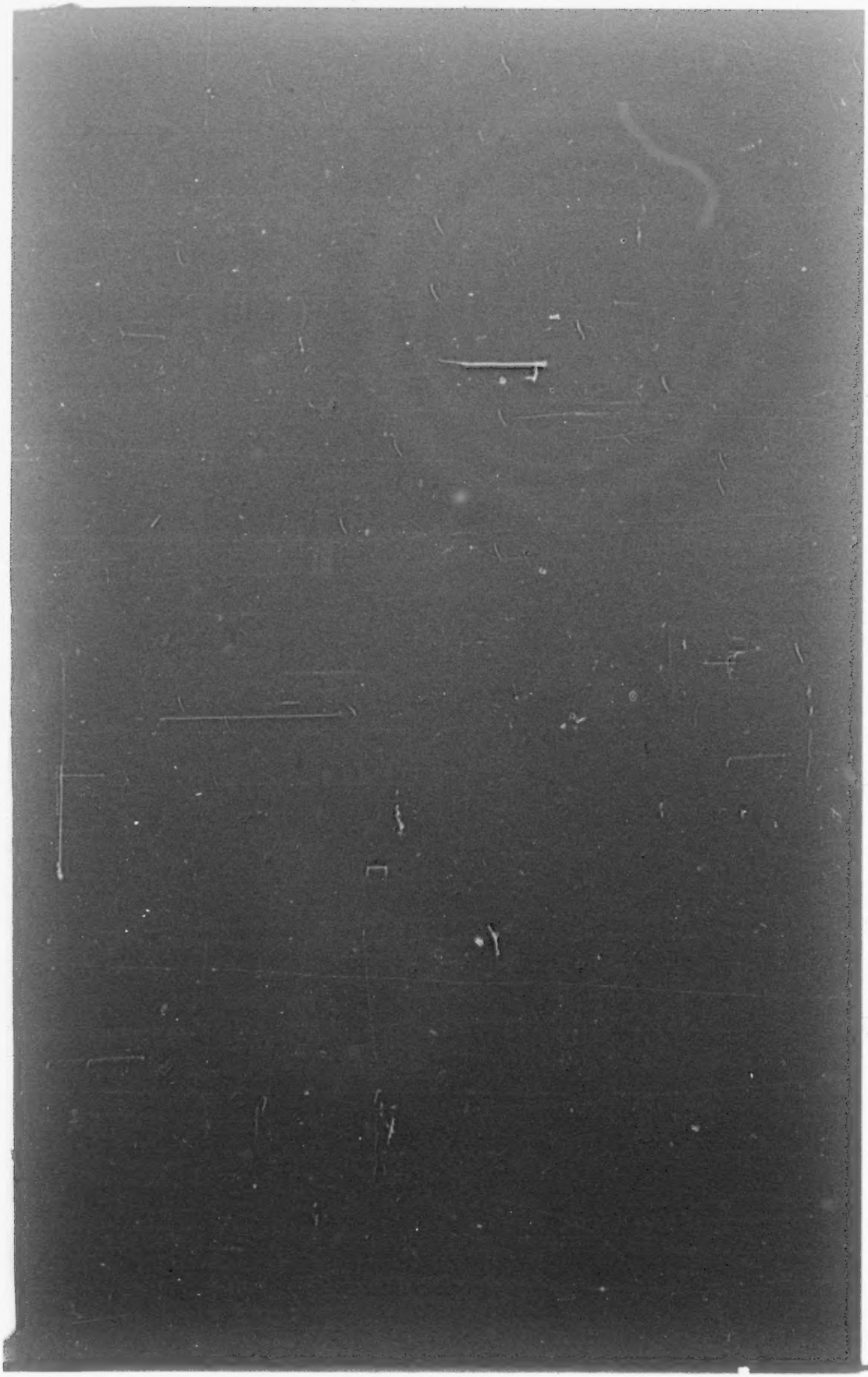
termine claims growing out of the Civil War, and commonly known as 'war claims,' or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March, 1887, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the 27th day of June, 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

Sections 5 and 6 of the Tucker Act appear without change in U. S. C. Title 28, Sections 762 and 763 respectively.

Section 3226 of the Revised Statutes, as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been col ected without authority, or of any

sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."



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37762—38

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 647

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 11–13) is reported at 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 19–29) is not yet officially reported.

JURISDICTION

The judgment of the court below was entered on December 8, 1937. (R. 30.) The petition for writ of certiorari was filed December 24, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Febuary 13, 1925.

QUESTION PRESENTED

Whether an action against the United States brought in the United States District Court to recover taxes illegally collected is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed with the clerk of the District Court.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the petitioner's brief, pp. 12–14.

STATEMENT

The only question presented by the petition for writ of certiorari is whether the instant action, which is a suit to recover income and profits taxes alleged to have been illegally assessed and collected from the petitioner for the years 1917 to 1921, inclusive, in the aggregate sum of $313,249.71, was timely brought.

This action was brought in the United States District Court for the District of Massachusetts. From the allegations of the petition filed with that court (R. 1–7) it appears that the taxes in controversy were duly paid, that the Collectors of Internal Revenue who collected such revenue were not in office at the time the petition was filed, and that the claims for refund, upon which the suit is based, were seasonably filed and were rejected by the Commissioner of Internal Revenue on March 22, 1927.

On March 21, 1929, the petitioner filed the petition in question in the office of the clerk of the United States District Court for the District of Massachusetts. (R. 1.) On March 25, 1929, a copy of the petition was served by the attorney for the petitioner upon the United States Attorney for the District of Massachusetts. (R. 7.) On the same day, March 25, 1929, a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States. (R. 7–8.) On March 28, 1929, an affidavit of service and mailing of the petition and notice was filed with the District Court. (R. 7.)

On May 16, 1929, the United States by its attorney, the United States Attorney for the District of Massachusetts, filed an answer denying every material allegation of the petition. (R. 8.) On January 2, 1932, the petition was dismissed without prejudice for lack of prosecution. (R. 8–9.) On May 28, 1935, a bill of review having been filed and allowed, the case was restored to the docket. (R. 9.) On May 4, 1937, the United States filed a motion to dismiss the petition on the ground that the District Court was without jurisdiction to hear and determine the cause, it being alleged that the action was barred by the provisions of Section 3226 of the Revised Statutes as amended by Section 1113 (a) of the Revenue Act of 1926. (R. 9.) On June 18, 1937, the court granted the motion to dismiss and a judgment of dismissal was entered on July

20, 1937. (R. 10.) An appeal was taken to the Circuit Court of Appeals for the First Circuit from the order of dismissal (R. 10–11, 13–15), and was affirmed by that court in an opinion filed December 8, 1937, one judge dissenting. (R. 19–29.)

ARGUMENT

The principal reason advanced by the petitioner in support of its application for a writ of certiorari is that the particular question involved is an important question of Federal law which has not been, but which should be, settled by this Court (Br. 4–7).

We submit that the question involved is not of such general importance as the petitioner contends. The provisions of the Tucker Act, c. 359, 24 Stat. 505, here involved, have been in effect since March 3, 1887. However, the precise question presented by this petition has arisen in only a very few isolated cases, none of which, with the exception of *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th), appears to have reached the appellate courts.

Further, if the Rules of Civil Procedure for the District Courts of the United States are adopted as proposed by the Advisory Committee on Rules for Civil Procedure, appointed by this Court, the question will probably not arise in the future. See Rules 3 and 4 in the draft of April 1937, together with the amendment of Rule 4 by the final report of November, 1937.

The petitioner further asserts (Br. 7–8) that the decision below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walton* v. *United States, supra.* We submit there is no direct conflict. As pointed out by the court below, the *Walton* case, *supra,* "reached the correct result, but by a wrong course of reasoning". (R. 25.) The result reached in the *Walton* case, *supra,* and in the instant case is the same. Each involves the provisions of the Tucker Act, *supra.* In each case the petition was filed with the United States District Court prior to the expiration of the period for bringing suit. In each case, also, a copy of the petition was served upon the United States Attorney and a copy mailed to the Attorney General after expiration of that period. In the *Walton* case the court recognized that the United States is immune from suit except where it has given its consent to be sued, and that when the United States has consented to be sued the procedure prescribed by Congress must be strictly followed in order to give the courts jurisdiction. It mistakenly, as we believe, held that the Tucker Act does not specify the time when an action is commenced against the United States, but by applying the law of South Dakota, the district wherein the action was brought, held that "the time of the service of a copy of the petition upon the United States District Attorney should determine the time when the action was commenced". *Id.,* p. 18.

Petitioner argues that the reasoning of the court in the *Walton* case, *supra,* would require a decision in its favor since, under Massachusetts law, the issuance of a summons marks the commencement of a suit. But the reasoning of the court in the *Walton* case would not require a different decision in the instant case because of the inherent difference in legal effect of the mere filing of a petition with the clerk of the District Court under the Tucker Act, *supra,* and the issuance of a summons under Massachusetts law. Even under Massachusetts law the suit is not counted as begun until machinery for notification of the defendants has been set in motion. "The office of a summons and a complaint are too variant to admit of the one doing the service of the other. The complaint is but a vehicle, construed by law to convey to the defendant, *in extenso*, the nature of the grievance laid against him, while the summons performs the function of imparting notice of the limitation of the time in which the charge is to be met by appropriate legal action." *Hooper* v. *Hooper,* 67 Ore. 187, 189–190. Cf. *Wilson* v. *Winchester & P. R. Co.,* 82 Fed. 15 (C. C. W. Va.), affirmed, 99 Fed. 642 (C. C. A. 4th). It may be that the court in the *Walton* case would have balked at the application of State law had it required the result that the jurisdictional requirements of the Tucker Act could be met without timely notice to the officers of the United States that the suit had been brought.

The petitioner also suggests (Br. 6–7) that a decision of the question here involved is necessary to supplement the decision of this Court in the case of *Munro* v. *United States,* No. 218, present term, now awaiting decision. The questions presented in the two cases are, however, entirely different. In the *Munro* case, *supra,* the petitioner sought to bring an action against the United States in accordance with the New York Civil Practice Act by causing a summons to be issued by the District Court to the United States Attorney and a copy to be mailed to the Attorney General. He failed to comply with the provisions of Sections 5 and 6 of the Tucker Act, *supra,* and the substance of his argument is that under the Conformity Act, c. 255, 17 Stat. 196 (Revised Statutes, Section 914), his suit was properly brought. That case involves the question whether suit can be brought against the United States without proceeding in accordance with the Tucker Act, while the only question presented in this case, which was brought in accordance with the Tucker Act, is whether service of the petition upon the United States Attorney must be made in accordance with the Act prior to expiration of the period for bringing suit.

The final reason advanced in support of the petition is that the decision of the court below is erroneous. We submit, however, that the decision is correct, and is fully supported by the law and the authorities relied upon in the majority opinion below.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions, and the question presented is not of sufficient general importance to justify review by this Court. It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

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JANUARY, 1938

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 647

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 9–12) is reported at 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 16–25) is not yet officially reported.

JURISDICTION

The judgment of the court below was entered on December 8, 1937 (R. 25). The petition for writ of certiorari was filed December 24, 1937, and was granted January 31, 1938 (R. 25, 26). The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an action against the United States brought in the United States District Court to recover taxes illegally collected is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed with the clerk of the District Court.

STATUTES INVOLVED

The statutes involved are printed in the Appendix *infra*, pp. 21–26.

STATEMENT

This action was brought in the United States District Court for the District of Massachusetts to recover income and profits taxes alleged to have been illegally assessed and collected from the petitioner for the years 1917 to 1921, inclusive, in the aggregate sum of $313,349.71. From the allegations of the petition filed with that court it appears that the taxes in controversy were duly paid; that the Collectors of Internal Revenue who collected such revenue were not in office at the time the petition was filed; and that the claims for refund, upon which the suit is based, were seasonably filed and were rejected by the Commissioner of Internal Revenue on March 22, 1927 (R. 1–6).

The petition upon which this action is based was filed with the clerk of the United States District

Court for the District of Massachusetts on March 21, 1929 (R. 1). On March 25, 1929, a copy of the petition was served by the attorney for the petitioner upon the United States Attorney for the District of Massachusetts (R. 6). On the same day, March 25, 1929, a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States (R. 6–7). On March 28, 1929, an affidavit of service and mailing of the petition and notice was filed with the District Court (R. 6).

On May 16, 1929, the United States, by its attorney, the United States Attorney for the District of Massachusetts, filed an answer denying every material allegation of the petition (R. 7). On January 2, 1932, the petition was dismissed without prejudice for lack of prosecution (R. 7). On May 28, 1935, a bill of review having been filed and allowed, the case was restored to the docket (R. 7). On May 4, 1937, the United States filed a motion to dismiss the petition on the ground that the District Court was without jurisdiction to hear and determine the cause, it being alleged that the action was barred by the provisions of Section 3226 of the Revised Statutes as amended by Section 1113 (a) of the Revenue Act of 1926 (R. 8). On June 18, 1937, the court granted the motion to dismiss (R. 8) and a judgment of dismissal was entered on July 20, 1937 (R. 9). An appeal was taken to the Circuit Court of Appeals for the First Circuit from the order of dismissal

(R. 9, 12–14), and was affirmed by that court in an opinion filed December 8, 1937, one judge dissenting (R. 16–25).

SUMMARY OF ARGUMENT

Suit was not begun by the petitioner within the time permitted by Section 3226 of the Revised Statutes. The action, being brought against the United States in the District Court, was required to be brought in accordance with the provisions of Sections 5 and 6 of the Tucker Act. Although the petition was filed within the time allotted by Section 3226, the requirements of service contained in Section 6 of the Tucker Act were not complied with until after expiration of the period for bringing suit.

Suits against the United States can be maintained only by permission. They must be brought in accordance with the procedure prescribed by statute and subject to all restrictions imposed upon such suits. This alone is sufficient to justify a decision that the provisions prescribed by Sections 5 and 6 of the Tucker Act must be complied with prior to the expiration of the period for bringing suit. Furthermore, the procedure prescribed is intended for the protection and benefit of the United States. This protection cannot be insured unless it is held that an action is not begun against the United States at least until a copy of the petition is served upon the United States Attorney, as required by Section 6 of the Tucker Act. While

there is nothing in the statute itself indicating that service must be made prior to expiration of the statutory period, there is nothing indicating a contrary intention on the part of Congress. In fact, the requirement of service would indicate an intention that service upon the United States Attorney, who is by law under duty to appear and defend the action, would be a prerequisite to the beginning of a suit.

The decisions dealing with the commencement of an action at common law do not support the petitioner's argument that a suit against the United States should be deemed to have been begun with the filing of a petition. The reasoning behind those decisions supports the principle that service upon the United States Attorney must be made prior to expiration of the period for bringing suit.

Furthermore, the principles enunciated in the equity decisions relied upon by the petitioner, as well as in other equity cases, tend rather to support this principle than the argument of the petitioner that the filing of the petition constitutes the commencement of the action.

The fact that the filing of a petition constitutes the commencement of a suit in the Court of Claims for the purposes of the statute of limitations has no application to suits under the Tucker Act in the District Courts where a different procedure is prescribed and actual service is mandatory.

ARGUMENT

SUIT AGAINST THE UNITED STATES WAS NOT "BEGUN" WITHIN THE MEANING OF SECTION 3226 OF THE REVISED STATUTES MERELY BY FILING A PETITION

Section 3226 of the Revised Statutes, as amended, and reenacted in Section 1113 (a) of the Revenue Act of 1926 (U. S. C., Title 26, Section 1672), provides that a suit for the collection of any internal revenue tax alleged to have been erroneously assessed or collected shall be begun within two years after the disallowance of the part of the claim to which the suit relates. The petitioner's claims for refund for the years 1917 to 1921, inclusive, were rejected by the Commissioner of Internal Revenue on March 22, 1927 (R. 15), and accordingly the two-year period expired March 22, 1929. Within that period, and on March 21, 1929, the petitioner filed in the District Court a petition seeking a refund of a portion of the taxes paid for those years. No further steps were taken during the period of limitations, but on March 25, 1929, a copy of the petition was served on the United States Attorney and a copy was sent by registered mail to the Attorney General. An affidavit of service and mailing was filed in the District Court on March 28, 1929.

This action was brought pursuant to the provisions of Section 24 (20) of the Judicial Code, as amended (U. S. C., Title 28, Section 41 (20)), giving the District Courts jurisdiction concurrent with the Court of Claims of suits for refund of taxes erroneously collected in excess of $10,000, if the Collector

is dead or out of office. This provision had its origin in Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505. Section 5 of that Act provides that the plaintiff in a suit against the United States in a District Court *shall* file a duly verified petition with the Clerk. Section 6 provides that the plaintiff *shall* serve a copy of the petition upon the United States Attorney, send a copy to the Attorney General by registered mail, and file with the Clerk an affidavit of such service and mailing; that upon service of a copy of the petition upon the United States Attorney, he shall be under the duty to appear and defend the interests of the Government by a plea, answer, or demurrer within sixty days thereafter, unless the time be extended by order of the court; and that upon his neglect to file a defense, the plaintiff may proceed with the case under such rules as the court may adopt, but not have judgment unless he shall establish his claim by proof satisfactory to the court. It is significant that the provisions relating to the procedure required of the plaintiff are expressly mandatory.

While, for the purposes of this case, it is only necessary to determine whether service on the United States Attorney is necessary to toll the statute, there is support for the proposition that all of the steps required by Sections 5 and 6 of the Tucker Act must be taken before the suit can be deemed to have been "begun" within the meaning of this statute.

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Suits against the United States can only be brought by permission, in the manner and subject to the restrictions imposed (*Reid* v. *United States*, 211 U. S. 529, 538; *Lynch* v. *United States*, 292 U. S. 571, 581–582), and statutes waiving the Government's sovereign immunity against suit are to be strictly construed in favor of the United States. *Nichols* v. *United States*, 7 Wall. 122, 126; *Schillinger* v. *United States*, 155 U. S. 163, 166; *Price* v. *United States*, 174 U. S. 373; *Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 686; *United States* v. *Michel*, 282 U. S. 656, 659.

The Tucker Act, which gave the privilege of suit, has imposed not only the restriction that a petition shall be filed, but also that it shall be served upon the United States Attorney and the Attorney General. These latter requirements, as well as the requirement that a petition shall be filed, are conditions upon the right to sue. No distinction is made between them in the statute; the mere placing of them in different sections does not indicate a difference as to their mandatory character.

In *Bachmann, Emmerich & Co.* v. *United States*, decided June 4, 1935 (S. D. N. Y.), unreported but published in 1935 C. C. H. Vol. 3–A, par. 9427, the District Court held that compliance with all of the steps was required in order to begin the suit and toll the limitations, and in *Munro* v. *United States*, No. 218, Present Term, decided January 31, 1938, while this Court did not specifically decide the

question here involved, in affirming the court below, this Court noted that the provisions of Sections 5 and 6, requiring filing of the petition and service, had not been complied with prior to the running of the statute, and restated the rule that suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed.

We submit that, in any event, it is necessary at least to serve the United States Attorney with a copy of the petition before suit can be deemed to have been begun, and the Court need go no further in deciding the instant case.

While there has been a tendency among the lower courts to hold that the Government may waive its right to insist upon strict compliance with the requirement that a copy of the petition be mailed to the Attorney General and the affidavit of service and mailing be filed, they have uniformly held that service upon the United States Attorney must be made within the time prescribed for bringing suit. *Walton* v. *United States*, 73 F. (2d) 15 (C. C. A. 8th); *Little* v. *United States*, 54 F. (2d) 711 (W. D. La.); *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.); *Creasy* v. *United States*, 20 F. Supp. 280 (W. D. Va.); *Wilhelm* v. *United States*, 18 F. Supp. 600 (M. D. N. C.); *Bachmann, Emmerich & Co.* v. *United States*, decided June 4, 1935 (S. D. N. Y.), unreported but published in 1935 C. C. H. Vol. 3–A, par. 9427; *Irving Trust Co.* v. *United States*, de-

cided October 21, 1935 (S. D. N. Y.), unreported but published in 1935 C. C. H. Vol. 3–A, par. 9600; *Jones* v. *United States,* decided January 14, 1936 (N. D. Ohio), unreported but published in 1936 C. C. H. Vol. 4, par. 9072; *Hostetter* v. *United States,* decided July 29, 1937 (W. D. Pa.), unreported but published in 1937 C. C. H. Vol. 4, par. 9436. Cf. *National Casket Co.* v. *United States,* 263 Fed. 246 (S. D. N. Y.); *Cassarello* v. *United States,* 265 Fed. 326 (M. D. Pa.); *Spencer* v. *United States,* 14 F. Supp. 46 (Mass.).

In conferring jurisdiction upon the district courts concurrent with the Court of Claims to entertain suit against the United States, Congress prescribed procedure which, it is now settled by the *Munro* case, must be strictly followed. The procedure prescribed is totally unlike the procedure to be followed in the usual case of litigation between individuals. The conditions and restrictions imposed upon claimants who seek to assert their rights against the United States in the district courts are intended for the protection of the United States. The requirement that a copy of the petition filed with the court be served upon the United States Attorney is as important and as much for the protection of the United States as is the requirement that a petition be filed containing a statement of the nature of plaintiff's claim, and the facts upon which it is based. While there is nothing in the statute requiring that

service of the petition be made upon the United States Attorney within the time allowed for suit there is nothing indicating a contrary intention on the part of Congress. For that matter, there is nothing in the statute specifically stating when the petition itself shall be filed.

The substance of the petitioner's argument is that the filing of the petition should be treated as the commencement of the suit if the petition is filed with the honest intention of prosecuting the action. We submit that the Court, in construing a statute prescribing the conditions upon which the United States have consented to be sued should avoid any such indefinite test. There is nothing in the statute to justify the petitioner's position, and the petitioner finds it necessary to resort to decisions of state courts applying principles of common law to proceedings of an entirely different nature. It is argued that the substance of the decisions relied upon is that the initial step taken by the plaintiff constitutes the commencement of his action. If these authorities are examined, it will be seen that the initial step which constitutes the beginning of the action is that step taken by the plaintiff which calls into motion the machinery of the court, or other agency for notification to the defendant. No such act is accomplished by the mere filing of a petition in the district court in suits against the United States. The duty of defending actions against the United States is imposed by Section 6 of the Tucker Act upon the United States

Attorney, and it is not until he has been served with a copy of the petition that the United States Attorney is called upon to appear and defend the action.

The first step in a common law action is the "issuance," "purchase," or "suing out" of a writ, and the decisions relied upon by the petitioner (Br. 12–17) hold generally that this step marks the commencement of the action. This was generally held to be true, however, not because it was the first step, but because it was by nature a process which had for its purpose notification to the defendant. This is all that was decided in *Johnson* v. *Smith,* 2 Bur. 950 (K. B. 1758–61). There, a writ of latitat was in fact sued out as the first step. The writ of latitat was held sufficient to commence the action, not because it happened to be the first step taken but because it was a writ to bring the defendant into custody.

In the other cases cited (Br. 13), the reason for holding the "issuance" or "suing out" of the writ to constitute the commencement of the action was not because it was the first step, but because it was a step which served to notify the defendant or bring him into custody, which in the instant case is not performed until the petition is served on the United States Attorney. The discussion in *Farwell* v. *Johnson,* 7 Me. 370, was only *dictum,* because there the writ had been sued out and executed by special attachment within the statutory period. *Randall* v. *Bacon,* 49 Vt. 20, did not even involve the

statute of limitations, but a question of proper tender of a note before commencement of action, and it was there held that service of the writ marked the commencement of the action. The decision in *Brown* v. *Babbington,* 2 Raymond 880 (K. B. 1694–1732), illustrates the point that it is not the first step, irrespective of the nature thereof, which constitutes the commencement of the suit. In that case it was held that the issuing of a writ of "clausum fregit" did not stop the running of the statute, although that of latitat did, because the latter was used "to bring a man into custody." (P. 882.) *Society for Propagating the Gospel* v. *Whitcomb,* 2 N. H. 227, did not involve the commencement of an original action, but involved the proper period for bringing an action of review. The court there held that for the purpose of the statute involved the word "brought" means the procurement of the writ with a view to service upon the opposing party.

It is true, as pointed out by petitioner (Br. 14), that in jurisdictions such as Pennsylvania, where the process is issued by the court itself upon the filing of a praecipe or docketing of the case, the action is deemed commenced when the praecipe is filed. This is because, as pointed out in *Gibson* v. *Pittsburgh Trans. Co.,* 311 Pa. 312, 315, by filing his praecipe for summons "a litigant has set in motion the machinery of the court" which will result in the defendant appearing to defend the action.

It is submitted that procedural steps effective for bringing a defendant into court must be taken before the limitation can be considered to have been tolled, and since the sole means of bringing the United States into court is found in the Tucker Act, the limitation has not been tolled where, as here, the provisions of that Act with respect to service have not been complied with in time.

It has been generally held that the statute of limitations is not tolled unless procedural steps have been taken which are legally effective for bringing the defendant into court. In *United States* v. *American Lumber Co.*, 80 Fed. 309 affirmed 85 Fed. 827 (C. C. A. 9th), it was held that the statute limiting the time within which suits might be "brought" by the United States to cancel land patents was not complied with by invoking an invalid process, even though done in good faith upon the mistaken assumption that the process was valid. The lower court states, referring to the general rule as to when an action is commenced so as to toll a statute of limitations (p. 316):

> * * * the action, while it may be deemed "commenced" or "brought," so far as the plaintiff is concerned, when the complaint is filed, is not considered "commenced" or "brought" *so far as the defendant is concerned,* so as to stop the running of a statute of limitations, until legal steps have been taken to make him a party by suing out the

> appropriate process and making a *bona fide* effort to serve the same. [Italics ours.]

And, in the opinion of the Circuit Court of Appeals, it is further said (p. 831):

> It does not aid the *bona fides* of the attempt to serve that the appellant's counsel thought that the subpoenas could be legally served by the persons to whom they were sent. It is immaterial what may have been his belief or his opinion in that regard. The *bona fides* must be shown by proof that an effort was made to proceed according to law, and that use was made, or attempted to be made, of the *means which the law prescribes*. [Italics ours.]

See also *Fernekes & Bros.* v. *Case,* 75 Iowa 152; *Jackson* v. *Brooks,* 14 Wend. (N. Y.) 649, 654; *Dorr's Adm'r* v. *Rohr,* 82 Va. 359; *Brock* v. *Francis,* 89 Kans. 463; *Bacigalupo* v. *Superior Court,* 108 Cal. 92; *Town of Woodville* v. *Town of Harrison,* 73 Wis. 360; *Jordan* v. *Bosworth,* 123 Ga. 879; *Maddox* v. *Humphries,* 30 Tex. 494; *Bates* v. *Smith & Bros.,* 80 Tex. 242; *Casey* v. *Newport Rolling Mill Co.,* 156 Ky. 623.

Furthermore, the Tucker Act provides the only procedure for bringing the United States into court. Any conditions attached by Congress to the privilege of suing the United States must be strictly complied with (*Nichols* v. *United States,* 7 Wall. 122, 126; *Schillinger* v. *United States,* 155 U. S. 163, 166; *Price* v. *United States,* 174 U. S. 373; *Eastern*

Transp. Co. v. *United States,* 272 U. S. 675, 686; *United States* v. *Michel,* 282 U. S. 656, 659), and this rule applies to the procedure to be followed (*McElrath* v. *United States,* 102 U. S. 426; *Reid* v. *United States,* 211 U. S. 529, 538), even as to purely formal matters (*Rock Island R. R.* v. *United States,* 254 U. S. 141, 143). Where Congress has prescribed definite rules governing any matter of procedure or practice in the United States courts, such rules are to that extent exclusive of local rules of practice and procedure relating to the same matter which might otherwise be applicable under the Conformity Act. *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, 209, and cases cited therein; *Mexican Central Railway* v. *Pinkney,* 149 U. S. 194, 206; *United States* v. *Lindholm,* 79 F. (2d) 784, 787.

The petitioner further relies upon certain decisions in equity cases as furnishing an even stronger support for his position that the filing of a petition marks the commencement of an action against the United States under the Tucker Act (Br. 15–17). Here, again, however, it would seem that the analogy drawn by the petitioner is not sufficient to compel a decision in its favor. Reliance is placed principally upon the rule as stated in *Mound City Co.* v. *Castleman,* 187 Fed. 921, 925 (C. C. A. 8th), that a suit in equity is commenced by the filing of a petition or bill with the honest intention to prosecute the suit diligently, provided there is no detrimental or unnecessary delay in the subsequent is-

sue or service of the process. It appears from the decisions cited above, however, that, in so far as the defendant is concerned, the good faith of the complaining party is not controlling where an improper process is invoked; and in the decisions relied upon by the plaintiff there is nothing to show that the process of the court was not invoked at the time the petition was filed.

The reason for this rule in equity, as in actions at common law, is that in equity the filing of the bill containing the prayer for issuance of a writ resulted in the issuance of the writ as a matter of course. See *United States* v. *American Lumber Co.*, 85 Fed. 827, 829. The same appears to be true today under the Equity Rules of 1912. *Equitable Life Assur. Soc. of U. S. v. Schwartz*, 42 F. (2d) 646 (C. C. A. 5th), where the court said process "is to be issued by the clerk as of course, whenever a bill is filed." See, also, *United States* v. *Hardy*, 74 F. (2d) 841, 842 (C. C. A. 4th).

That this is the reason for the rule in equity has been pointed out frequently (*Fitch* v. *Smith*, 10 Paige 9; *Pindell* v. *Maydwell*, 46 Ky. 314; *United States* v. *American Lumber Co., supra*), but, in so far as the defendant is concerned, the suing out of process against him marks the commencement of the suit. Cf. *United States* v. *Northern Finance Corporation*, 16 F. (2d) 998 (C. C. A. 2d); *International Paper Co.* v. *Commonwealth*, 232 Mass. 7.

Examination of the other cases cited by petitioner (Br. 16) does not indicate an invariable rule that the filing of the petition in an equity action constitutes commencement of the suit. In most of the cases the statement of the rule is *dictum,* the bill having been filed and process issued prior to the running of the statute. This was the situation in *Lin Timber Co.* v. *United States,* 236 U. S. 574; *Humane Bit Co.* v. *Barnet,* 117 Fed. 316 (N. J.), and *United States* v. *American Lumber Co., supra.* In others, the question involved commencement of the action for jurisdictional purposes rather than for purposes of the statute of limitations. See *Mound City* v. *Castleman,* 187 Fed. 921 (C. C. A. 8th); *Farmers' Loan, &c., Co.* v. *Lake St. Rd. Co.,* 177 U. S. 51. In others, the court stated that issuance of the writ, rather than filing of the bill, marked the commencement of the suit. See *United States* v. *Miller,* 164 Fed. 444 (Ore.); *United States* v. *Northern Finance Corp., supra.*

In the instant case, no action was taken which could amount to process until the copy of the petition was served upon the United States Attorney, and there is no principle to be found in the cases relied upon by petitioner to justify treating the suit as "begun," within the meaning of the statute, until such service was made.

The fact relied upon in the dissenting opinion and by the petitioner (Br. 18–22) that suit is "begun" in the Court of Claims when the petition is filed, and the argument that since the District Court's jurisdiction under the Tucker Act is concurrent with that of the Court of Claims the same rule should apply, are of no force when it is remembered that the statute provides in effect with respect to the Court of Claims that the filing of the petition shall toll the statute of limitations (Revised Statutes, Section 1069), while Sections 5 and 6 of the Tucker Act specifically require with respect to suits in the District Courts not only that a petition shall be filed but that service shall be made upon the United States Attorney and the Attorney General. Furthermore, as the majority opinion noted, the United States is the only party against which a suit may be brought in the Court of Claims, and there was no occasion for service of process upon the Government by the plaintiff in that court, since the Clerk forwards a copy of the petition to the Attorney General, who, with his assistants, is required to appear in that court and defend all cases, while in the District Courts the United States is not the only party against whom suits may be brought, and, accordingly, notice was expressly required.

CONCLUSION

The decision of the court below is correct and shoud be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

JAMES W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
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Special Assistants to the Attorney General.

O. W. HAMMONDS,
Attorney.

MARCH 1938.

APPENDIX

Revised Statutes:

SEC. 3226 [as reenacted by Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of that part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail (U. S. C., Title 26, Section 1672).

Act of March 3, 1887, c. 359, 24 Stat. 505:

SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. (U. S. C., Title 28, Section 762.)

SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided,* That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense,

as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court (U. S. C., Title 28, Section 763).

Judicial Code:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department,

or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury (U. S. C., Title 28, Section 41 (20)).

Section 24 of the Judicial Code was amended by the Revenue Act of 1921, c. 136, 42 Stat. 227, as follows:

SEC. 1310. (c) Paragraph "Twentieth" of Section 24 of the Judicial Code is amended by adding at the end thereof the following new paragraph: "Concurrent with the

Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal-revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced" (U. S. C., Title 28, Section 41).

Judicial Code:

SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * * (U. S. C., Title 28, Section 250).

* * * * *

SEC. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law,

within six years after the claim first accrues: * * * (U. S. C., Title 28, Section 262).

SEC. 159. The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney (U. S. C., Title 28, Section 265).

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 647.

BATES MANUFACTURING COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA.

On Petition for Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF OF AMICUS CURIAE.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 647.

BATES MANUFACTURING COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF AMICUS CURIAE.

The undersigned respectfully petitions this Honorable Court for leave to file a brief as amicus curiae in the above-entitled cause. The Solicitor General and counsel for the petitioner have assented in writing, as indicated by letters filed with the Clerk of this Court.

This application is made by the undersigned as counsel for the petitioner in the case of *Pinnacle Mills, through J. F. Smith, Receiver*, v. *United States of America*, now pending before the District Court of the United States for the Eastern District of Tennessee, Northeastern Division, on the defendant's motion to dismiss the petition.

Respectfully submitted,

THEODORE B. BENSON.

The District Court held suit was not "begun" by filing the verified petition and dismissed the cause of action.[4] The Court of Appeals affirmed.[5]

It is conceded that suit in the Court of Claims is "begun" when the petition is filed. Yet, it is insisted that suit is not "begun" in the District Court when the petition is filed although the Court of Claims and the District Courts are given concurrent jurisdiction by the Tucker Act. Consideration of the history and language of the statute leads us to a different conclusion.

Section 10 of the Act of March 13, 1863,[6] provides "That every claim against the United States, cognizable by the Court of Claims, shall be forever barred *unless the petition setting forth a statement of the claim be filed . . . within six years after the claim first accrues . . . .*"

When the Tucker Act in 1887 greatly expanded the jurisdiction of the Court of Claims and gave District Courts concurrent jurisdiction in *all* cases involving certain amounts, its limitation in *both the Court of Claims and the District Courts* provided:

" . . . no suit against the government of the United States shall be allowed under this Act unless the same *shall have been brought within six years after the right accrued . . . .*"

The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitations applicable alike "to any or all" of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims.[7]

The purpose of giving the District Courts concurrent jurisdiction with the Court of Claims was to provide additional opportunity for the consideration and determination of claims that had "long pressed upon the consideration of Congress"[8] and to permit suit to "be brought in the District where the parties reside."[9] After

[4] 19 Fed. Supp. 526.

[5] — F. (2d) —.

[6] 12 Stat. 765, 767.

[7] Congressional Record and Appendix, 49th Cong., 2nd Sess., March 3, p. 2679.

[8] House Report No. 1077, 49th Cong., 1st Sess., by Mr. Tucker on the Tucker Bill.

[9] Congressional Record and Appendix, 49th Cong., 2nd Sess., March 3, p. 2679.

discussing the benefits of previous legislation creating and extending the jurisdiction of the Court of Claims, the Committee on the Judiciary reported to the House:

"The history of this legislation and its results have been given to show how much of benefit has been done in the satisfactory decisions of claims against the Government and in relief of the Congress. But it has long been felt that the benefits could be made much greater by extending the jurisdiction of the Court. . . . It is needless to say more than has already been intimated as to the general policy of this legislation. The large mass of business now before Congress growing out of private claims consumes its time year after year in committee work, rendered useless by the lack of time to consider and pass upon them. Just claims are painfully deferred without interest, and the credit of the Government, so strictly upheld upon its bonded debt, is justly censured in respect to its honest and private claims."[10]

In response to the needs disclosed by this report Congress passed the Tucker Act, manifestly intending to provide adequate opportunity for expeditious and orderly determination of claims against the Government. This Act not only expanded the jurisdiction of the Court of Claims, but, for the first time, gave District Courts general authority to hear and determine claims against the Government. Relief of existing claim congestion and prevention of future congestion obviously demanded an integrated jurisdictional plan by which the Court of Claims and District Courts could afford equal opportunities for expeditious and fair trials of like claims within the jurisdictional amount of the District Courts. The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. We find no support in the background or objective of the Act for a construction under which a claimant's rights would be preserved

[10] House Rep. No. 1077, *supra*, pp. 3-4.

by filing a petition in the Court of Claims, but would be lost—without additional action—in the District Court.

As said by this Court in *United States* v. *Greathouse*, 166 U. S. 601, 606:

" . . . it was not contemplated that the limitation upon suits against the Government in the District . . . Courts of the United States should be different from that applicable to like suits in the Court of Claims."

As used in this statute the word "begun" should be given its ordinary and accustomed meaning. To begin is to start; to institute; to initiate; to commence. This suit was begun—within two years after the refund claim was disallowed—when the petition was filed in court in good faith. Notice was mailed the Attorney General and the District Attorney was promptly served—both within four days after the verified petition was filed. Under these circumstances, we do not consider what would be the effect of lack of diligence in obtaining service.[11] The judgment in the court below was not in harmony with the views here expressed and is

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[11] Compare, Linn Timber Co. v. United States, 236 U. S. 574, 578.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 647.

BATES MANUFACTURING COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF AMICUS CURIAE.

Preliminary Statement.

This brief is filed in behalf of Pinnacle Mills. That corporation is plaintiff in a suit filed under the Tucker Act, U. S. C., Title 28, Secs. 41(20), 762 and 763, to recover an alleged overpayment of income tax, now pending before the United States District Court for the Eastern District of Tennessee.

In that case counsel for the defendant, the United States, has moved to dismiss the petition on the ground that the cause of action is barred by the statute of limitations because not "begun" within the limitation period in Section 3226 of the Revised Statutes, as amended, the specific ground being that suit is not "begun" until service is actually made on the district attorney.

Pinnacle Mills filed its petition and complied with the provisions of Section 5 of the Tucker Act, U. S. C., Title 28, Sec. 762, within the two year period defined in Section 3226 of the Revised Statutes and the plaintiff further complied with

the requirements of Section 6 of the Tucker Act, U. S. C., Title 28, Sec. 763, by filing an affidavit of mailing a copy of the petition to the Attorney General of the United States and by causing process to issue, a copy of the petition to be placed in the hands of the marshal "to be served" on the district attorney, and paid the marshal's fee. Service by the marshal on the district attorney was, however, not actually made until after the expiration of the limitation period defined in Section 3226 of the Revised Statutes, but before the return day of the writ.

THE ARGUMENT.

In *Leo N. Munro* v. *United States*, October Term, 1937, No. 218, the plaintiff timely filed a praecipe for the issuance of summons which was timely served on the United States Attorney but no petition, within the purview of Section 5 of the Tucker Act, was filed until after the expiration of the statutory period for suit. In *Bates Manufacturing Company* v. *United States*, October Term, 1937, No. 647, on petition for certiorari, a petition was timely filed but service was not actually made on the district attorney until shortly after the expiration of the statutory period. The question presented in both cases as well as in *Pinnacle Mills* v. *United States* is, when is suit "begun" or "brought" within the meaning of the applicable statute of limitation? In *Pinnacle Mills* v. *United States*, the plaintiff contends that literal compliance was made with all requirements of the Tucker Act, when the plaintiff timely placed itself within the authority of the court, by filing its petition and the affidavit of mailing to the Attorney General and by causing process to issue to be served by the marshal under authority of the court.

In the memorandum of argument filed by counsel for the defendant with the District Court the decisions of the United States Circuit Courts of Appeals in both *Munro* v. *United States* and *Bates Manufacturing Company* v. *United States* are relied on and urged as authority for the contention that suit was not begun within the limitation period.

Counsel for Pinnacle Mills believes and respectfully submits that, in *Munro* v. *United States* this Court will be required to

decide whether suit can be brought without the timely filing of a petition, and in *Bates Manufacturing Company* v. *United States*, the petition having been timely filed, this Court should grant the writ in order that it may be decided what further steps, if any, are necessary to begin a suit under the Tucker Act. It is in the latter question that the plaintiff in *Pinnacle Mills* v. *United States* is vitally interested and, therefore, prays that the writ be granted in the *Bates Manufacturing Company* v. *United States*, in order that this Court may have squarely before it the question, when a suit is "begun" within the meaning of Section 3226 of the Revised Statutes in a case in which the first step is the filing of a petition as required by Section 5 of the Tucker Act.

Should the decision below in *Bates Manufacturing Company* v. *United States* be allowed to stand, it would doubtless be followed by the District Court in *Pinnacle Mills* v. *United States* in direct conflict with the decision of this Court in the *Mill Creek & Minehill Nav. & R. Co.* v. *United States*, 251 U. S. 539, 40 S. Ct. 118, Aff'g 246 Fed. 1013, in which precisely the same question that counsel for the United States raise in their motion to dismiss in the District Court was squarely presented to this Court in assignments of error in petition for review. It is necessary to go to the record to see what issues were presented in *Mill Creek & Minehill Nav. & R. Co.* v. *United States*. The decision would also be in conflict with the decision of this Court in *Linn & Lane Timber Company* v. *United States*, 236 U. S. 574, 35 S. Ct. 440, 59 L. Ed. 725, affirming 196 Fed. 593, in which this Court held that a suit is begun when the bill is filed and subpoena issued and delivered to the marshal for service before the running of this statute, reasonable diligence being shown for actual service thereafter. In both of these cases this Court held that it is sufficient to cause process to issue and be delivered to the marshal, to be later served by exercise of reasonable diligence.

In the case of *United States* v. *Adams*, decided by the Circuit Court of Appeals for the Fifth Circuit on December 17, 1937, and unofficially reported in 1937 C. C. H. Federal Tax Service, Volume 4, Paragraph 9608, it was held that an action by the United States to establish liability against stockholders of a

liquidated corporation for the taxes of the corporation was begun within the meaning of the applicable Statute of Limitations when the bill of complaint was filed with a bona fide intention to prosecute the suit, and that it was not necessary that process issue within the limitation period.

Respectfully submitted,

THEODORE B. BENSON,
Amicus Curiae.

CHARLES E. FOSTER, JR.,
JOHN JENNINGS, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 647.—October Term, 1937.

Bates Manufacturing Company, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 28, 1938.]

Mr. Justice Black delivered the opinion of the Court.

The Revenue Act of 1926[1] provides that "No suit . . . shall be maintained *in any court* for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . unless such suit . . . is begun within two years after the disallowance of . . . such claim . . . ."

The Tucker Act of March 3, 1887[2] as amended, gives concurrent jurisdiction to the District Courts and the Court of Claims in suits against the United States including those for recovery of erroneous or illegally collected taxes.[3] Section 5 of the Tucker Act requires a plaintiff bringing suit against the government in the District Court to "file a petition, duly verified with the clerk of the respective court having jurisdiction of the case." Section 6 requires "that the plaintiff . . . cause a copy of his petition . . . to be served upon the district attorney . . . , and . . . mail a copy . . . to the Attorney General . . . , and cause to be filed with the clerk of the court . . . affidavit of such service and . . . mailing . . . ."

March 22, 1927, the petitioner's claim for tax refund was disallowed. March 21, 1929, *within two years after the disallowance*, a duly verified petition was filed in the District Court claiming the refund. March 25, 1929, two years and four days after the disallowance, the petition was served on the United States Attorney and mailed to the Attorney General.

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[1] c 37, 44 Stat. 9, Sec. 1113.
[2] c. 359, 24 Stat. 505, 506.
[3] U. S. C. Title 28, Sec. 41 (20), (Judicial Code Sec. 24 (20) as amended).